

# *American Journal of International Law*



*July*                      *1970*  
*Vol. 64*                *No. 3*



*Published by The*  
*American Society of International Law*

No. 3  
1975  
PATRONS

Honorable ARTHUR H. DEAN  
Honorable HERMAN PHLEGER  
MRS. BENJAMIN J. TILLAR (deceased)  
MR. W. ROBERT MORGAN

*In Memoriam*

DR. JAMES BROWN SCOTT  
MR. HENRY C. MORRIS  
MR. ARTHUR K. KUHN  
MR. ALEXANDER FREEMAN

**PATRONAGE, GIFTS AND BEQUESTS**

Upon donation to the Society of \$5,000 or more by gift or bequest, any member of the Society or individual eligible for membership may be elected a Patron of the Society. Upon donation of at least \$5,000 in the name of a deceased person, such person may be elected a Patron posthumously.

Gifts and bequests may be made in the name of the American Society of International Law, Washington, D. C. Such contributions are deductible from Federal returns for income, estate and gift tax purposes. The Society is incorporated by Act of Congress approved September 20, 1950 (64 Stat. 869).

**MANLEY O. HUDSON MEDAL**

The American Society of International Law bestows from time to time without regard to nationality a gold medal to commemorate the life work of Manley O. Hudson. Such awards are made for pre-eminent scholarship and achievement in international law and in the promotion of the establishment and maintenance of international relations on the basis of law and justice. Medals have been awarded to Manley O. Hudson (1956), Lord McNair (1959), Philip C. Jessup (1964), Charles De Visscher (1966), and Paul Guggenheim (1970).





# AMERICAN JOURNAL OF INTERNATIONAL LAW

90

VOL. 64

July, 1970

NO. 3

## CONTENTS

	PAGE
The Treaty on Treaties <i>Richard D. Kearney and Robert E. Dalton</i>	495
The Lateral Boundaries of the Continental Shelf and the Judgment of the International Court of Justice in the North Sea Continental Shelf Cases <i>Etienne Grisel</i>	562
Co-Operation for Development in the Lower Mekong Basin <i>Virginia Morsey Wheeler</i>	594
<b>Editorial Comment:</b>	
The U. N. and Human Rights Complaints: U Thant as Strict Constructionist <i>R. B. Lillich</i>	610
<b>Notes and Comments:</b>	
Retirement of Editor-in-Chief of the <i>Journal</i> <i>E.H.F.</i>	615
Report of the Thirteenth Meeting of the Advisory Committee on "Foreign Relations of the United States" <i>Elmer Plischke</i>	615
Fifth Award of the Manley O. Hudson Gold Medal <i>Ralph G. Albrecht</i>	622
64th Annual Meeting of the American Society of International Law <i>Eleanor H. Finch</i>	623
Increase in Membership Dues and Subscription Rates of the <i>Journal</i> and <i>International Legal Materials</i> <i>E.H.F.</i>	629
<b>Correspondence:</b>	
Letter from Professor B. A. Wortley	630
U. S. Contemporary Practice Relating to International Law <i>Steven C. Nelson</i>	631
Judicial Decisions Involving Questions of International Law <i>Edited by Alona E. Evans</i>	653
<b>Book Reviews and Notes. Edited by Leo Gross:</b>	
Smith, Delbert D., <i>International Telecommunication Control</i>	719
Falk, Richard A., <i>Legal Order in a Violent World</i>	720
— (ed.), <i>The Vietnam War and International Law</i> , Vol. 2	721
Friedmann, Wolfgang G., Oliver J. Lissitzyn, Richard C. Pugh, <i>Cases and Materials on International Law</i>	723
Corbett, Percy E., <i>From International to World Law</i>	724
Anand, R. P., <i>Studies in International Adjudication</i>	725
Nikolaev, A. N., <i>Territorialnoe more</i>	727
UNITAR, <i>Wider Acceptance of Multilateral Treaties</i>	728

## CONTENTS (*cont'd.*)

	PAGE
Bayer, <i>Die Aufhebung völkerrechtliche Verträge im deutschen parlamentarischen Regierungssystem</i>	729
Yemin, Edward, <i>Legislative Powers in the United Nations and Specialized Agencies</i>	731
Briefer Notices: Halderman, 732; Dumbauld, 732; Beilenson, 733; Hanafusa, 733; UNITAR, 734; British Year Book of International Law, 1965-1966, 734; Modeen, 735; Roucouas, 735; McConaughy and Elanks, 736	
Books Received	737

### Official Documents

United Nations International Law Commission. Report on Work of Its 21st Session, <i>June 2-August 8, 1969</i>	741
International Legal Materials. Contents, Vol. IX, No. 3 ( <i>May</i> ), 1970	807

The views expressed in the articles, editorial comments, book reviews and notes, and other contributions which appear in the JOURNAL are those of the individual authors and are not to be taken as representing the views of the Board of Editors or of The American Society of International Law.

---

The JOURNAL is published five times a year and is supplied to all members of The American Society of International Law without extra charge. The annual subscription to non-members of the Society is \$20.00. Available back numbers of the current volume of the JOURNAL will be supplied at \$4.50 a copy; other available back numbers at \$5.00 a copy.

Subscriptions, orders for back numbers, correspondence with reference to the JOURNAL, manuscripts and books for review should be sent to the Assistant Editor of the JOURNAL, 2223 Massachusetts Avenue, N. W., Washington, D. C. 20008.

PUBLICATION OFFICE:  
PRINCE AND LEMON STREETS  
LANCASTER, PA. 17604

EDITORIAL AND EXECUTIVE OFFICE:  
2223 MASSACHUSETTS AVENUE, N. W.  
WASHINGTON, D. C. 20008

Copyright © 1970 by The American Society of International Law  
Second-class postage paid at Lancaster, Pa.

## The American Society of International Law

The American Society of International Law was organized in 1906 "to foster the study of international law and to promote the establishment and maintenance of international relations on the basis of law and justice."

The Society serves as a meeting place and forum for scholars, teachers, officials, lawyers and others, from some ninety-seven countries. At the end of April, it holds a three-day Annual Meeting in Washington at which current problems of international law are discussed. The Society also sponsors regional meetings outside of Washington in co-operation with other institutions. Salient questions of international law and relations are considered in depth by panels and study groups organized by the Society's Board of Review and Development. Works of scholarship are often published under the Society's auspices in connection with studies sponsored by the Board.

The Society periodically issues three publications:

*The American Journal of International Law*, the leading journal in the field of international law, has been published since 1907. A special number of the *Journal* carries the papers and discussions of the annual meeting of the Society. The *Journal* is distributed to all members of the Society without additional charge, and is available to non-members at a subscription rate of \$20 a year.

*International Legal Materials*, a bimonthly, is a unique international collection of texts of current official documents, including legislation, treaties, court decisions, and reports. Subscription rates are \$15 a year for members of the Society, \$25 for others.

The monthly *Letter to Members* provides news of the Society and other organizations in the field and reports on pending international litigation.

Society membership is open to all persons of whatever nationality and profession who are interested in its objectives. Dues are: regular, \$15 for residents of the United States, \$10 for non-residents; professional, \$30; intermediate, \$10; student, \$5. Application for membership may be made on the form printed at the back of this issue of the JOURNAL.

### OFFICERS OF THE SOCIETY, 1970-1971

<i>Honorary President</i> .....	PHILIP C. JESSUP
<i>President</i> .....	HAROLD D. LASSWELL
<i>Executive Vice President</i> .....	STEPHEN M. SCHWEBEL
<i>Vice Presidents</i> .....	RICHARD A. FALK, COVEY T. OLIVER, WILLIAM D. ROGERS
<i>Honorary Vice Presidents:</i>	DEAN G. ACHESON, WILLIAM W. BISHOP, JR., HERBERT W. BRIGGS, ARTHUR H. DEAN, HARDY C. DILLARD, CHARLES G. FENWICK, GREEN H. HACKWORTH, JAMES N. HYDE, HANS Kelsen, CHARLES E. MARTIN, BRUNSON MACCHESNEY, MYRES S. McDOUGAL, OSCAR SCHACHTER, JOHN R. STEVENSON, ROBERT R. WILSON, QUINCY WRIGHT
<i>Secretary</i> .....	EDWARD DUMBAULD
<i>Treasurer</i> .....	FRANZ M. OPPENHEIMER
<i>Assistant Treasurer</i> .....	JAMES C. CONNER

## BOARD OF EDITORS

### *Editor-in-Chief*

RICHARD R. BAXTER

Harvard Law School

WILLIAM W. BISHOP, JR.  
University of Michigan Law School

JOHN CAREY  
New York, N. Y.

ALONA E. EVANS  
Wellesley College

RICHARD A. FALK  
Princeton University

ALWYN V. FREEMAN  
Beverly Hills, California

WOLFGANG FRIEDMANN  
Columbia University School of Law

JOHN N. HAZARD  
Columbia University School of Law

LOUIS HENKIN  
Columbia University School of Law

JAMES NEVINS HYDE  
New York, N. Y.

RICHARD B. LILICH  
University of Virginia Law School

OLIVER J. LISSITZYN  
Columbia University

BRUNSON MACCHESNEY  
Northwestern University Law School

MYRES S. McDOUGAL  
Yale Law School

STANLEY D. METZGER  
Washington, D. C.

COVEY T. OLIVER  
University of Pennsylvania  
Law School

STEFAN A. RIESENFELD  
University of California Law School

OSCAR SCHACHTER  
New York, N. Y.

STEPHEN M. SCHWEBEL  
Washington, D. C.

LOUIS B. SOHN  
Harvard Law School

ERIC STEIN  
University of Michigan Law School

RICHARD YOUNG  
Van Hornesville, N. Y.

### *Honorary Editors*

HERBERT W. BRIGGS  
Cornell University

HARDY C. DILLARD  
University of Virginia Law School

CHARLES G. FENWICK  
Washington, D. C.

LEO GROSS  
Fletcher School of Law and  
Diplomacy, Tufts University

PHILIP C. JESSUP  
New York, N. Y.

HANS Kelsen  
University of California

JOSEF L. KUNZ  
University of Toledo

PITMAN B. POTTER  
American University

JOHN B. WHITTON  
Princeton University

ROBERT R. WILSON  
Duke University

QUINCY WRIGHT  
University of Virginia

### *Assistant Editor*

ELEANOR H. FINCH

### *Editorial Assistant*

ROSEMARY G. CONLEY

## THE TREATY ON TREATIES

BY RICHARD D. KEARNEY and ROBERT E. DALTON \*

The Vienna Convention on the Law of Treaties,<sup>1</sup> the product of two lengthy sessions of the hundred-and-ten-nation conference held in 1968 and 1969 and of preparatory work extending over fifteen years by the International Law Commission, is the first essential element of infrastructure that has been worked out in the enormous task of codifying international law pursuant to Article 13 of the United Nations Charter. The previous codification treaties, the four conventions on the Law of the Sea, the Vienna Convention on Diplomatic Relations, the Vienna Convention on Consular Relations and the Convention on the Reduction of Statelessness, did not, despite their intrinsic importance, grapple with the fundamentals of constructing a world legal order.

The Diplomatic and Consular Conventions are essentially "in-house" efforts, concerned with blueprinting the mechanics of international relations. The Law of the Sea Conventions, while affecting issues of primary interest to the international community, are concerned with special regimes within a substantially self-contained area of international law.<sup>2</sup>

The Convention on the Law of Treaties sets forth the code of rules that will govern the indispensable element<sup>3</sup> in the conduct of foreign affairs, the mechanism without which international intercourse could not exist, much less function. It is possible to imagine a future in which the treaty will no longer be the standard device for dealing with any and all international problems—a future in which, for example, the use of regulations promulgated by international organizations in special fields of activity, such as the World Health Organization's sanitary regulations,<sup>4</sup> will become the accepted substitute for the lawmaking activity now effected through international agreement. But, in the present state of international development, this is crystal-gazing. For the foreseeable future, the treaty will remain the cement that holds the world community together.

\* Office of the Legal Adviser, Department of State. The views expressed are the personal views of the authors and are not to be attributed to the Department of State.

<sup>1</sup> 63 A.J.I.L. 875 (1969); 8 Int. Legal Materials 679 (1969).

<sup>2</sup> The Territorial Sea and the Contiguous Zone, the High Seas, Fishing and Conservation of the Living Resources of the High Seas, and the Continental Shelf.

<sup>3</sup> McNair described the treaty as "the only and sadly overworked instrument with which international society is equipped for the purpose of carrying out its multifarious transactions." "The Functions and Differing Legal Character of Treaties," 11 Brit. Yr. Bk. Int. Law 101 (1930); reprinted in McNair, *The Law of Treaties* 739, 740 (1961).

<sup>4</sup> See, e.g., the smallpox vaccination certificate regulations of 1956, 11 U.S. Treaties 133; or the regulations on the health part of the aircraft general declaration of 1960, 12 *ibid.* 2950.

## BACKGROUND

Given the indispensability of the international agreement and an ancestry that has been traced back to Sumer,<sup>5</sup> it is reasonable to expect that, of all the areas of international law, the law of treaties would have become the most thoroughly developed and the most broadly accepted. However, as late as 1935, the introductory comment to the Harvard Draft Convention on the Law of Treaties remarked that "at the threshold of this subject, one encounters the fact that there is no clear and well-defined law of treaties."<sup>6</sup>

Thirteen years later an even more pessimistic analysis was expressed in the *Survey of International Law in Relation to the Work of Codification of the International Law Commission*, the study that was prepared by the United Nations Secretariat to assist the International Law Commission in deciding upon a long-range program of work. Despite efforts to bring order into the field of treaty law, such as the codification efforts under the League of Nations,<sup>7</sup> the International Commission of American Jurists, and the Harvard Research in International Law, the United Nations Survey found that there was scarcely a topic in the entire field that was "free from doubt and, in some cases, from confusion."<sup>8</sup>

This judgment pertained "not only to the question of the terminology applied to the conception of treaties, to the legal consequences of the distinction between treaties proper and [other] intergovernmental agreements, and to the designation of the parties to treaties"; there was "uncertainty as to the necessity of ratification with regard to treaties which have no provision for ratification; in the matter of the important subject of the relevance of the constitutional limitations upon the treaty-making power; and in respect of conferment of benefits upon third parties."<sup>9</sup> Possibly this lack of law in light of the elemental importance of the subject impelled the Commission in drawing up its order of codification priority at the first session in 1949 to give the law of treaties top billing.<sup>10</sup> At the same session the Commission elected the distinguished British jurist, James L. Brierly, Chichele Professor at Oxford, as the special rapporteur for the subject.<sup>11</sup>

In the Commission's task of codifying international law, the special rapporteur plays the most important individual rôle. He does the basic research, delimits the scope of a topic, provides the conceptual approach, and submits the original content and form of specific rules.<sup>12</sup> In the fifteen

<sup>5</sup> Korff, "An Introduction to the History of International Law," 18 A.J.I.L. 246, 249 (1924).

<sup>6</sup> Research in International Law Under the Auspices of the Faculty of the Harvard Law School, Law of Treaties, 29 A.J.I.L. Supp. 653 at 666 (1935).

<sup>7</sup> See, League of Nations Committee of Experts Report to the Council on Questionnaire No. 5 (1927).

<sup>8</sup> Survey of International Law in Relation to the Work of Codification of the International Law Commission, U.N. Doc. A/CN.4/I/Rev. 1, at 52 (1948).

<sup>9</sup> *Ibid.*

<sup>10</sup> 1949 I.L.C. Yearbook 58, U.N. Doc. A/CN.4/SF.7 (1949).

<sup>11</sup> *Ibid.* at 238, U.N. Doc. A/CN.4/SR.33 (1949).

<sup>12</sup> See 1952 I.L.C. Yearbook (I) 220-222, 224-227, U.N. Doc. A/CN.4/SER.A (1952).

years the Commission was concerned with the law of treaties, four outstanding British lawyers successively served as special rapporteurs. In 1952 Brierly was succeeded by Sir Hersch Lauterpacht, widely known for a number of magisterial works, including his editions of Oppenheim's *International Law*, who in turn was succeeded by Sir Gerald Fitzmaurice, Legal Adviser of the British Foreign Office. Upon the latter's election to the International Court of Justice, the Commission selected in 1961 Sir Humphrey Waldock, Chichele Professor of International Law at Oxford and quondam Chairman of the European Commission on Human Rights, to carry on the work.

Each of the rapporteurs approached the law of treaties not only with a different colligatory approach<sup>13</sup> but also from widely varying viewpoints on many of the individual issues.<sup>14</sup>

The threshold question—who can be a party to a treaty—is an interesting illustration of variations on a theme. Brierly advanced the broad principle that all states and international organizations have capacity to make treaties, coupled with the vague qualification that this capacity could be limited in respect of some states entering into certain treaties.<sup>15</sup>

Lauterpacht handled the question as a validity issue and held “an instrument is void as a treaty if concluded in disregard of the international limitations upon the capacity of the parties to conclude treaties.”<sup>16</sup> This would appear to imply that some states do not have capacity to enter into a treaty even though the instrument concerned may not lack all aspects of legal enforceability.

Fitzmaurice laid down the prescription “a State has the capacity to participate in a given treaty (a) if its general treaty-making capacity is not limited so as to exclude participation in that treaty or class of treaty; (b) if it fulfils any special conditions of participation that may be laid down by the treaty itself.”<sup>17</sup> The proposition is almost, but not quite, circular. Finally, Waldock, in his first report, laid down as the guiding principle that every independent state, whether unitary or federated or otherwise unified, has capacity to become a party to treaties and that other subjects of international law have this capacity if given them by treaty or by international custom. Waldock also laid down specific rules regarding the capacity of

---

Cf. Statute of the International Law Commission, Art. 16 (f), General Assembly Res. 174, General Assembly, 2nd Sess., Official Records, U.N. Doc. A/519 at 105 (1947).

<sup>13</sup> 1961 I.L.C. Yearbook (I) 256, U.N. Doc. A/CN.4/SER.A (1961).

<sup>14</sup> See, e.g., Jenks, “Hersch Lauterpacht—The Scholar as Prophet,” 36 Brit. Yr. Bk. Int. Law 88-89 (1960).

<sup>15</sup> Brierly, (First) Report on the Law of Treaties, 1950 I.L.C. Yearbook (II) 223, U.N. Doc. A/CN.4/23 (1950).

<sup>16</sup> Lauterpacht, (First) Report on the Law of Treaties, 1953 I.L.C. Yearbook (II) 92, U.N. Doc. A/CN.4/63 (1953).

<sup>17</sup> Fitzmaurice, (First) Report on the Law of Treaties, 1956 I.L.C. Yearbook (II) 109, U.N. Doc. A/CN.4/101 (1956).

constituent States of a federal union, of dependent states and of international organizations to enter into treaties.<sup>18</sup>

Differences in approach and viewpoint regarding the law of treaties were much greater in the Commission itself, which is intended to represent "... the main forms of civilization and ... the principal legal systems of the world."<sup>19</sup> Its twenty-five members, in fact, come from every corner of the world. The members who worked out the final draft articles on the law of treaties were drawn from states as remote from each other as Finland and Argentina, as diverse in size as Brazil and Togo, as different in culture as the United States and Afghanistan, as unlike in legal practice as the United Kingdom and Uruguay, as dissimilar in political philosophy as Austria and Iraq, as disparate in economic theory as Japan and Poland.<sup>20</sup>

That a Commission containing such diversities and dealing with a subject as difficult and as unsettled as the law of treaties was able to reach agreement on the seventy-five draft articles<sup>21</sup> which served as the working text for the Vienna Conference was a substantial achievement. The Commission's methodology was to lay down general rules regarding treaties in general language. The vast majority of the articles set forth two or three basic rules on a subject that could have called for an entire section of detailed regulation.

The capacity of states to make treaties again supplies an apt example. Waldock's 1962 draft article was a series of rules that dealt with the major aspects of the problem in sufficient detail to answer the most obvious questions regarding the treaty-making powers of a constituent unit of a federal state, the circumstances under which a dependent state may enter into treaties and the capacity of international organizations to make treaties.<sup>22</sup> The article as it appeared at the end of the 1962 session in the Report to the General Assembly is much shorter and leaves open a number of questions:

1. Capacity to conclude treaties under international law is possessed by States and by other subjects of international law.
2. In a federal State, the capacity of the member states of a federal union to conclude treaties depends on the federal constitution.
3. In the case of international organizations, capacity to conclude treaties depends on the constitution of the organization concerned.<sup>23</sup>

The changes from the Waldock article represent not merely a different drafting approach or even different legal concepts but also mirror political issues that lie below the surface of this innocent-appearing topic. Thus

<sup>18</sup> Waldock, First Report on the Law of Treaties, 1962 I.L.C. Yearbook (II) 35-36, U.N. Doc. A/CN.4/144 (1962).

<sup>19</sup> I.L.C. Stat., Art. 8.

<sup>20</sup> I.L.C. Report, U.N. General Assembly, 21st Sess., Official Records, Supp. 9, at 6, U.N. Doc. A/6309/Rev. 1 (1966).

<sup>21</sup> *Ibid.* at 10-100. Reprinted in 61 A.J.I.L. 263-285 (1967).

<sup>22</sup> Waldock, note 18 above.

<sup>23</sup> I.L.C. Report, U.N. General Assembly, 17th Sess., Official Records, Supp. 9 at 7, U.N. Doc. A/5209 (1962).



the disappearance of the independent-dependent state antinomy was triggered by Tunkin of the U.S.S.R., who urged the thesis that contemporary international law did not sanction dependent territories such as colonies and protectorates.<sup>24</sup>

Another interesting example of a predisposition to generality in drafting is the final version of the Commission's article on fraud, which provided that "a State which has been induced to conclude a treaty by the fraudulent conduct of another negotiating State may invoke the fraud as invalidating its consent to be bound by the treaty." That is all there was on the subject of fraud. Clearly, there could have been a good deal more.<sup>25</sup>

There are cogent reasons for a spare approach in drafting codification treaties. One is the fact that some legal systems have a decided preference when dealing with basics to do so in a terse and general manner. Another is that attempts to construct detailed rules easily become bogged down in the conflicting claims of national legal systems and definitions. Reverting again to the subject of fraud, Waldock in his first draft included a definition of fraud based on common law principles. But after discussions in the Commission on the civil law concept of *dol*, he concluded a narrower definition was advisable.<sup>26</sup> And even this narrow definition eventually disappeared.

Generality in drafting, however, is well suited to the cosmetic method of disguising differences by a thick coating of undefined terms. It is a device too easily available and too often used in tailoring international documents. Concern was displayed on this point in the comments made by governments on the Commission's draft articles both during their formulation and after the final draft was submitted to the General Assembly. This was especially marked with regard to Part V of the Commission's draft on the Invalidity, Suspension and Termination of Treaties.<sup>27</sup> Moreover, criticism of the vagueness of language used was sometimes based on completely opposed positions as to what the language was intended to convey. One of the Commission's proposals was that a "treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of the Charter of the United Nations."<sup>28</sup> The principle as such was almost universally endorsed in the governmental comments.<sup>29</sup> A number

<sup>24</sup> 1962 I.L.C. Yearbook (I) 59, U.N. Doc. A/CN.4/Ser.A/1962.

<sup>25</sup> The Index to the U.S. Code requires three and a half columns to list the Federal enactments on various aspects of fraud. 18 U.S.C. 1341 on Mail Fraud, for example, begins, "Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations or promises . . ." and continues in the same way for another seventeen lines of very small type.

<sup>26</sup> 1963 I.L.C. Yearbook (I) 37, U.N. Doc. A/CN.4/Ser.A/1963.

<sup>27</sup> See II Analytical Compilation of Comments and Observations Made in 1966 and 1967 with Respect to the Final Draft Articles on the Law of Treaties [hereinafter cited as Analytical Compilation] 235-387 *passim*. U.N. Doc. A/CONF. 39/5 (1968).

<sup>28</sup> I.L.C. Report, note 20 above, at 16.

<sup>29</sup> II Analytical Compilation, note 27 above, at 269-287.

cf states complained that the wording was too limiting, along the lines of the Algerian comment:

. . . rather than the words "the threat or use of force", [his delegation] would have preferred a categorical and imperative formula excluding any form of coercion. Other forms of pressure, such as economic forms, should be mentioned as covered by the idea of coercion.<sup>30</sup>

On the other hand, the United States commented regarding "threat or use of force":

. . . If a definite meaning had been given this phrase in United Nations usage, this would have aided in supplying protection against possible use of the article for unwarranted attempts to evade treaty obligations. But it is common knowledge that there are very substantial differences as to what is a use of force in violation of the Charter of the United Nations. It has been erroneously urged from some quarters that adverse propaganda or economic measures against a State constitute a threat or use of force in violation of Charter principles. . . .<sup>31</sup>

These, and other doctrinal disputes glossed over in the Commission's articles, resulted in some solid in-fighting at the Vienna Conference.

Trouble spots of this character were not too frequent in the technical provisions that comprised the bulk of the Commission's draft articles. The eighteen articles in Part II on the Conclusion and Entry into Force of Treaties appeared to raise problems more of the best way of doing things rather than whether they should be done at all. In general, this is true of Part III on the Observance, Application and Interpretation of Treaties. Part IV on the Amendment and Modification of Treaties and Part VII on Depositaries, Notifications, Corrections and Registration also seemed to fit into this category. Nonetheless there were sufficient technical difficulties and doctrinal disputes facing the conference when it assembled in Vienna on March 26, 1968, to lead some states to question whether a convention could be adopted in two sessions.<sup>32</sup>

The method of work adopted by the conference heightened this concern. Rather than parceling the draft articles out to two or three committees for review, redrafting if necessary, and initial approval, the conference functioned as a committee of the whole for practically the entire 1968 session. Each article was taken up for study seriatim by this one body. The time pressures this procedure generated, coupled with the extended debates arising out of issues such as the validity of treaties, settlement of disputes, and the "all-states" question, to mention only the most troublesome, made the conference a real cliff hanger. Proposals for a more efficient organization of the conference had been rejected on the ground that a number of the smaller states would have been hard pressed to spare experts to man more than one committee.<sup>33</sup>

<sup>30</sup> *Ibid.* at 269.

<sup>31</sup> *Ibid.* at 286.

<sup>32</sup> Cf. U.N. General Assembly, 22nd Sess., Official Records, Sixth Committee (1967), 967th meeting (Mr. Darwin).

<sup>33</sup> *Ibid.* "It was very important to the smaller countries that there should be only one main committee, so that they could participate effectively in the revision of [the] draft. . . ." (Mr. Mwenda [Kenya]).

In preparing for both sessions of the conference the United States Government relied heavily upon the Study Group on the Law of Treaties established by the American Society of International Law in 1965. With Oliver Lissitzyn of Columbia as chairman, this group of eminent international lawyers joined with representatives of the Departments of Justice and State in reviewing the Commission's draft articles in depth.

Subsequently the study group joined forces with the Special Committee on Treaty Law of the Section of International and Comparative Law of the American Bar Association. The basic United States positions for the conference were hammered out in this body. Three public members of the study group, Professor Herbert W. Briggs of Cornell, a member of the International Law Commission during the period in which the seventy-five draft articles were adopted, Professor Myres S. McDougal of Yale, and Dean Joseph M. Sweeney of Tulane served as representatives on the delegation to the 1968 session. John R. Stevenson, a member of both the Society study group and the Bar Association's committee on treaties, served as deputy chairman of the United States Delegation to the 1969 session.

This concentrated examination of the Commission's draft articles resulted in a good many United States proposals for amendment. A reasonable number of these proposals, or variations thereof, were accepted by the conference despite substantial reluctance among many delegations, and particularly those from newly independent states, to make any changes in the International Law Commission's draft. This reluctance came from a deeply held conviction on the part of the newer states that the Commission's draft articles reflected a new international law that took account of the problems of developing countries and that amendments proposed by the older and richer countries might be intended to undermine this new international law.<sup>34</sup> It is, of course, a widely held article of belief among former colonies that, prior to the United Nations, international law was largely developed by imperialist states to justify and support the policies of imperialism. The remarks of the representative of Ghana in the Sixth Committee discussion of the Commission's draft articles are enlightening:

The Commission could not have found a better justification for its work and all the countries that had just shaken off the colonialist yoke were delighted with its achievement, for they saw in it proof that international law was becoming a set of legal principles that applied to all countries and not simply to a few favoured States. In that connexion, he pointed out that most African countries had been colonized as a result of "gin-bottle" treaties concluded between African chiefs and the colonial Powers, which, whenever it suited them to do so, elevated those treaties to the status of solemn international agreements or reminded their luckless partners that the agreements which they had thus concluded had no standing in international law.<sup>35</sup>

<sup>34</sup> See I Analytical Compilation, note 29 above, at 40-41 (Tunisia); *cf. ibid.* at 39-40 (Thailand).

<sup>35</sup> I Analytical Compilation 24.

The Communist states devoted themselves assiduously to nurturing and fostering this belief. The Byelorussian representative in the Sixth Committee discussions affords a typical example:

The obstacles to successful codification of the topic lay, not in the fact that certain provisions were not ripe for codification, as the representative of the United Kingdom maintained, but in the efforts of certain States to preserve outmoded colonial privileges and treaties that were not in keeping with the spirit of the times or with developments in international law. Happily, the draft articles represented a complete break with the old colonial practice of concluding unequal treaties imposed by force. . . .<sup>36</sup>

The consequence of this viewpoint was a somewhat blind opposition to any change in the Commission's articles, not only in those that embodied innovative or controversial aspects but also in the great number of technical articles. Proposals for purely technical improvements were oftener than not greeted with dubiety. A fundamental fact of life at the conference was that forty-one delegations came from states that became independent after the outbreak of World War II. Any amendment that could not attract a reasonable degree of support from that group, and particularly the Asian-African section, was doomed.

#### INTRODUCTION (ARTICLES 1-5)

The very first United States proposal encountered a variation of this obstacle. The basic issue with respect to Article 1 was the scope of the convention. The draft article prepared by the Commission limited the scope of the convention to treaties concluded between states, thus excluding treaties to which international organizations are a party. In introducing an amendment to Article 1 to expand the coverage of the convention to treaties concluded by international organizations,<sup>37</sup> the United States representative suggested the establishment of a working group which would include observers of international organizations at the conference to consider the drafting. In making the proposal the United States had taken into account that a number of developing countries had urged such action in commenting on the draft articles. The debate in the committee of the whole established that a majority of the delegations, while not opposed to codifying the law with respect to treaties concluded between states and international organizations, feared that the time allotted for the conference was insufficient to permit dealing with the topic. Corridor discussion also revealed that a number of delegations suspected the purpose of the United States was to delay the conference with the aim of blocking a convention. This may have been fanned by a Soviet assertion that the proposal meant "the conference would be doomed to failure from the

<sup>36</sup> *Ibid.* at 14.

<sup>37</sup> U.N. Doc. A/CONF. 39/ C.1/L.15 (1968).

outset.”<sup>38</sup> Accordingly, a compromise was worked out, the United States withdrew its amendment, and a proposal by Sweden that the conference recommend reference of the subject to the International Law Commission for study was unanimously adopted.

The conference, in accordance with the general practice followed with respect to codification conventions, adopted Article 2 on definitions only after agreement had been reached on the substantive articles. However, there are advantages in treating the articles in the order finally adopted.

The nine subparagraphs of paragraph 1 of Article 2 define the following twelve terms: “treaty,” “ratification,” “acceptance,” “approval,” “accession,” “full powers,” “reservation,” “negotiating State,” “contracting State,” “party,” “third State,” and “international organization.” Paragraph 2 stresses that “the provisions of paragraph 1 regarding the use of terms in the present Convention are without prejudice to the use of those terms or to the meanings which may be given to them in the internal law of any State.”

The caveat in paragraph 2 should alert persons who may be accustomed to thinking of international agreements as of two kinds—treaties in the constitutional sense (e.g., Article II, Section 2, Clause 2, of the United States Constitution) and other international agreements—that the convention uses “treaty” in a generic rather than a specialized sense. The drafters of the *Restatement of Foreign Relations Law of the United States* faced a similar definitional problem. They solved it in Section 115 (a) by using “international agreement” as the generic term.<sup>39</sup>

The Harvard Draft specifically excluded from the definition of a treaty an agreement effected by the exchange of notes.<sup>40</sup> The Commission took the view that the convention should apply to a “treaty” whatever its particular designation. In its 1962 draft the Commission emphasized the generality of its definition by including the parenthetic catalog “(treaty, convention, protocol, covenant, charter, statute, act, declaration, concordat, exchange of notes, agreed minute, memorandum of agreement, *modus vivendi* or any other appellation)” immediately following the word “designation.”<sup>41</sup> It also tentatively adopted a definition of “treaty in simplified form.”<sup>42</sup> At the second reading of the articles in 1965 the Commission decided to use the generic term “treaty” to cover all forms of

<sup>38</sup> United Nations Conference on the Law of Treaties, First Session, Vienna, March 26–May 24, 1968, Official Records, Summary Records of the plenary meetings and of the meetings of the Committee of the Whole 13, U.N. Doc. A/CONF 39/11 (hereinafter cited as Official Records, First Session).

<sup>39</sup> See Restatement (Second), Foreign Relations Law of the United States § 115, comment a (1965).

<sup>40</sup> Art. 1(b), 29 A. J. I. L. Supp. 657 (1935).

<sup>41</sup> I.L.C. Report, U.N. General Assembly, 17th Sess., Official Records, Supp. 9, at 4 U.N. Doc. A/5209 (1962).

<sup>42</sup> *Ibid.*

international agreements in writing concluded between states.<sup>43</sup> Accordingly, the parenthetic catalog and the definition of "treaty in simplified form" do not appear in the text considered at Vienna.

The definition proposed by the Commission was:

"Treaty" means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.<sup>44</sup>

Among other amendments, a proposal by Chile would have replaced the Commission's definition by the following text: "Treaty means a written agreement between States, governed by international law, which produces legal effects."<sup>45</sup> A highly political amendment proposed by Ecuador would have altered the text to read:

"Treaty" means an international agreement concluded between States between States in written form and governed by international law *which deals with a licit object, is freely consented to, and is based on justice and equity*, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.<sup>46</sup>

Malaysia and Mexico were concerned at the omission from the definition of the element that the agreement must "establish a relationship between the parties" governed by international law and proposed incorporating that concept in the definition.<sup>47</sup>

At the second session of the conference Switzerland introduced an amendment to modify further the words "international agreement" in the definition of treaty. The Swiss delegate stated that the addition of the words "providing for rights and obligations" would rectify an omission in the Commission's text, which failed to distinguish between agreements which established legal rights and obligations and those which established only political relationships.<sup>48</sup>

After having been debated in the committee of the whole, the amendments discussed above were referred to the drafting committee for con-

<sup>43</sup> In response to the comments of a number of governments, the Commission had re-examined the concept of a treaty in simplified form and concluded that it lacked the degree of precision necessary to provide a satisfactory criterion for distinguishing between different categories of treaties in formulating rules relating to full powers and expression of consent to be bound. It therefore decided to recast those articles in terms which did not "call for any precise distinction to be drawn between 'formal treaties' and 'treaties in simplified form'" and to delete the definition of the latter. I.L.C. Report, U.N. General Assembly, 20th Sess., Official Records, Supp. 9, at 5 (par. 23), U.N. Doc. A/6009 (1965); 60 A.J.I.L. 155 (1966).

<sup>44</sup> I.L.C. Report, note 20 above, at 10.

<sup>45</sup> U.N. Doc. A/CONF.39/C.1/L.22.

<sup>46</sup> U.N. Doc. A/CONF.39/C.1/L.25 (1968).

<sup>47</sup> U.N. Doc. A/CONF.39/C.1/L.33 and Add. 1 (1968).

<sup>48</sup> U.N. Doc. A/CONF.39/C.1/SR. 87, at 3-4 (1969). It should be noted that this and subsequent footnotes cite the provisional records of the second session of the Conference, since the final records were not available at the time of preparation of this article.

sideration.<sup>49</sup> The latter reported that it had rejected all amendments to add to the text proposed by the Commission a reference to the legal effect of treaties as "superfluous in a definition, whose scope, as expressly stated at the beginning of the article, was limited to the 'purposes of the present Convention.'" In addition, the committee considered that the element with which the Swiss amendment dealt was already covered by the Commission's text. As for the Ecuadorean amendment, its insertion "would have been incompatible with the structure of Part V" of the convention. Indeed, the only amendment accepted by the drafting committee was one submitted by Spain to improve the French and Spanish texts.<sup>50</sup> The careful examination of the amendments to this subparagraph is characteristic of the skill and thoroughness with which the drafting committee, under the able chairmanship of Ambassador Yasseen of Iraq, carried out its important functions.

A different type of political opposition from that involved in Article 1 was encountered in connection with Article 5.<sup>51</sup> The Commission had proposed that the application of the convention to constituent instruments of an international organization or treaties adopted within an international organization should be subject to any relevant rules of the organization. The United States view was that the practical effect of this article was to exclude from the application of the convention a great number of important multilateral treaties. The Commission had not advanced any convincing reason for permitting an international organization to disregard the basic rules of treaty law in interpreting and applying its constituent instrument or a treaty adopted within the organization. The United States proposed to delete the article and to amend eight other articles to provide needed exceptions for international organizations.<sup>52</sup> Proposals to delete were also submitted by Congo (Brazzaville), the Philippines and Sweden. Zambia, Jamaica and Trinidad and Tobago proposed deleting the exception for treaties "adopted within an international organization." The Ukraine proposed replacing the words "shall be subject to any relevant rules" by "shall take into account the relevant rules." In addition, there were a number of proposals purportedly to clarify the language (France, Gabon, Peru and the United Kingdom) and a Ceylonese amendment to broaden the exception.

In the debates a goodly number of delegates expressed concern for the breadth of the exception contained in Article 5.<sup>53</sup> At the same time the observers for international organizations present at the conference were

<sup>49</sup> Report of the Committee of the Whole on its Work at the Second Session of the Conference, U.N. Doc. A/CONF.39/15, at 13, par. 24 (1969).

<sup>50</sup> U.N. Doc. A/CONF.39/C.1/SR.105, at 8-9 (1969).

<sup>51</sup> Unless otherwise indicated, all number references are to the Convention on the Law of Treaties rather than to the draft articles proposed by the Commission. A comparative table of the numbering of the two texts is contained in U.N. Doc. A/CONF.39/28 (1969), 8 Int. Legal Materials 714 (1969).

<sup>52</sup> U.N. Doc. A/CONF.39/C.1/L.21 (1968).

<sup>53</sup> Official Records, First Session 42-58 *passim*.

urging on the floor and in the corridors the need for the exemption. C. Wilfred Jenks, the Principal Deputy Director General of the International Labor Organization, was especially eloquent on this need for a *lex specialis* for international organizations in general and the International Labor Organization in particular.<sup>54</sup> He was strongly supported by Sir Francis Vallat, chief of the British Delegation.<sup>55</sup> When the question was put to the vote all the proposals to delete were soundly beaten by 84 votes to 10.<sup>56</sup> The negatives included a number of states such as The Netherlands whose delegates had indicated support for the United States proposal in the discussions. The more limited proposals of Zambia, Jamaica and Trinidad and Tobago were withdrawn without explanation and the Ukrainian lesser modification was defeated by a lesser no-vote, 42 to 26. After this display of strength by the international organizations, the clarifying amendments were referred to the drafting committee. The committee reported out a proposal that included substantial clarification:

The present Convention applies to any treaty which is the constituent instrument of an international organization and to any treaty adopted within an international organization without prejudice to any relevant rules of the organization.<sup>57</sup>

The article was adopted in this form by the committee of the whole and at the second session by the plenary. In its present form its character as *lex specialis* is less pronounced.

As was noted in reviewing the development in the Commission of rules on capacity to enter into treaties, an innocuous principle that appears desirable for technical reasons can contain political booby traps. The capacity article as finally reported out by the Commission<sup>58</sup> was truncated. Paragraph 1 stated simply that every state possessed capacity to conclude treaties. Paragraph 2 provided that States members of a federal union had treaty-making capacity if and to the extent provided in the federal constitution. The provision relating to the capacity of international organizations to make treaties had disappeared pursuant to the Commission's decision to confine its draft articles to treaties between states.

In the 1968 session of the conference there were a number of proposals to delete paragraph 1 on the basis it was so general as to be unnecessary. Abortive efforts were made to give it an appearance of meaningfulness by amendments requiring the state to be a subject of international law.<sup>59</sup> Eventually the paragraph was maintained unchanged in the text adopted at the 1969 session. (The underlying and explosive question of what states are entitled to become parties to treaties—the "all-states" issue—was

<sup>54</sup> *Ibid.* at 36-37.

<sup>55</sup> *Ibid.* at 44-45.

<sup>56</sup> I Draft Report of the Committee of the Whole on its Work at the First Session of the Conference 49, U.N. Doc. A/CONF.39/C.1/L.370/Rev.1 (1969).

<sup>57</sup> *Ibid.* at 50.

<sup>58</sup> I.L.C. Report, note 20 above, at 11.

<sup>59</sup> U.N. Docs. A/CONF.39/C.1/L.54/Rev. 1 (Finland), and A/CONF.39/C.1/L.80 (Congo [Brazzaville]) (1968).



raised by a new article<sup>60</sup> tabled by eleven states.) The second paragraph regarding federal states, however, occasioned a drawn-out fight. Canada was strongly opposed to it on several grounds and especially concerned that it might lead to the practice of interpretation by outside bodies of the constitutions of federal states. The Canadian Delegation emphasized that federal states having unwritten or partly written constitutions faced the greatest risk in this regard.<sup>61</sup>

The Soviet Union, however, came out in favor of the retention of the paragraph, pointing out that two of its constituent republics, the Ukrainian and the Byelorussian, were parties to many treaties.<sup>62</sup> France supported retention of the paragraph on the ground that the text reflected established practice.<sup>63</sup> It could have more fairly been said to support the French practice of negotiating and concluding agreements with the Canadian Province of Quebec.<sup>64</sup> The line as drawn was thus between Canada, which, because of the nature of its constitution, had grave concern regarding the paragraph, plus a group of other federal states that felt the paragraph was not worth the extensive revision required to make it tolerable and the Communist states that considered the paragraph contributed to the international prestige and status of Byelorussia and the Ukraine, plus France, which was pursuing an aspect of Gaullist foreign policy.

The amendments to delete were voted down by a relatively close margin, 45 to 38.<sup>65</sup> The article then went to the drafting committee where the second paragraph was somewhat polished up. When reported out, paragraph 2 was again voted upon and adopted by 46 votes to 39 and the article as a whole adopted by 54 votes to 17. This normally would have been the end of the story as far as the elimination of paragraph 2 was concerned. With very rare exceptions the articles adopted by simple majority in the committee of the whole were adopted by the required two-thirds majority in the plenary. Retention of paragraph 2 by the committee of the whole derived in substantial part from the reluctance to make changes in the Commission's draft on the part of the Asian-African group. The time lapse between the two sessions permitted reasoned arguments to be made in capitals on issues arising from the draft articles and reasoned consideration of those arguments. In the case of federal capacity it afforded Canada an opportunity to make the point that here was a rule whose deletion would not result in detriment to any state and whose reten-

<sup>60</sup> U.N. Doc. A/CONF.39/C.1/L.74 and Add. 1 and 2 (1968). The amendment proposed inserting the following new article . . . :

*"The right of participation in treaties"*

"All States have the right to participate in general multilateral treaties in accordance with the principle of sovereign equality."

<sup>61</sup> Official Records, First Session, at 62; cf. U.N. Doc. A/CONF.39/SR.7, at 12 (1969).

<sup>62</sup> *Ibid.* at 64.

<sup>63</sup> *Ibid.* at 67.

<sup>64</sup> E.g., Franco-Quebec Educational Entente of Feb. 27, 1965. See Fitzgerald, "Educational and Cultural Agreements and Ententes: France, Canada and Quebec—Birth of a New Treaty-Making Technique for Federal States?", 60 A.J.I.L. 529, 530-531 (1966).

<sup>65</sup> Official Records, First Session 69.

tion would cause actual difficulties to Canada. The United States assisted Canada in making these arguments in capitals, particularly those where Canada did not have permanent representation. This intersessional work paid off at the eighth plenary meeting of the conference. Paragraph 2 was rejected by 66 votes to 28.<sup>66</sup>

#### CONCLUSION AND ENTRY INTO FORCE OF TREATIES (ARTICLES 6-25)

As previously noted, however, most of the problems in the earlier articles were technical ones. The rules proposed by the Commission and adopted by the conference in Articles 7 through 17 regarding full powers, the adoption and authentication of a treaty text and the manner of expression of consent to be bound embodied the generally accepted practice with respect to these essentials of the treaty-making process. The conference, however, disagreed with the decision of the Commission that a general rule on means of expressing consent to be bound should not be included in the draft articles and that no specific reference should be made to agreements in simplified form.

The Commission had been motivated by a desire to avoid disputes over whether the general rule should favor ratification or signature, and a wish to simplify the text.<sup>67</sup> The majority view at the conference was that the total absence of a general rule on consent to be bound left the position of agreements in simplified form uncertain. As the making of international agreements through exchanges of notes or similar instruments had become a standard international practice, there was substantial support for filling the gap. This was done by adopting a general rule, Article 11:

The consent of a State to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed.

During the discussions, the partisans of ratification on the one hand and of signature on the other urged the conference to include in Article 11 a residuary rule on the means of expressing consent to be bound which would apply to the parties unless they had agreed on some other method. A considerable majority of the delegates, however, appeared to agree with the Swedish delegate's remarks that "the length of the debate was in inverse proportion to the practical importance of the subject, for the problem under discussion in fact arose very seldom."<sup>68</sup> Article 11 thus leaves the issue open. Specific provision was then made for agreements in simplified form by a new Article 13:

The consent of States to be bound by a treaty constituted by instruments exchanged between them is expressed by that exchange when:

- (a) the instruments provide that their exchange shall have that effect; or
- (b) it is otherwise established that those States were agreed that the exchange of instruments should have that effect.

<sup>66</sup> U.N. Doc. A/CONF.39/SR.8 at 16 (1969).

<sup>67</sup> I.L.C. Report, note 20 above, at 31.

<sup>68</sup> Official Records, First Session, at 88.

In Article 18, *Obligation not to defeat the object and purpose of a treaty prior to its entry into force*, the International Law Commission had proposed the following subparagraph: "A State is obliged to refrain from acts tending to frustrate the object of a proposed treaty when: (a) It has agreed to enter into negotiations for the conclusion of the treaty, while these negotiations are in progress."<sup>69</sup> Subparagraphs (b) and (c) proposed similar limitations for the periods between signature and ratification and after expressing consent to be bound and entry into force.

Sir Humphrey Waldock, in his capacity as expert consultant for the conference,<sup>70</sup> readily admitted subparagraph (a) did not constitute a rule of customary international law.<sup>71</sup> A number of delegations, including that of the United States, argued that rather than being a desirable innovation, the proposed rule might, if adopted, discourage states from entering into negotiations. Concern was also expressed as to the difficulty of determining the object of a treaty that is in process of negotiation. By a vote of 55 for, 33 against, with 11 abstentions, the subparagraph was deleted.<sup>72</sup>

The problem of reservations to treaties was the first major issue to be taken up by the conference. The articles adopted reflect the practice that has come to be followed since World War II. Before examining the details of the articles, a consideration of the history of the matter is needed.

The Harvard Draft accurately reflects the view generally accepted prior to World War II that, unless otherwise provided in the treaty itself, in order for a state to become party to a treaty with a reservation the unanimous consent of the other parties was required.<sup>73</sup> The first and second rapporteurs on the law of treaties, Brierly and Lauterpacht, proposed articles to this effect in 1950<sup>74</sup> and in 1953. Lauterpacht, however, supplemented his article with four alternative texts which substantially retreated from the unanimity doctrine as possible statements of law for the future.<sup>75</sup> Support for the unanimity rule eroded rapidly after 1951, when the International Court of Justice handed down its Advisory Opinion on *Reservations to the Genocide Convention*, and as a result of successive resolutions of the General Assembly pushing for a more practical approach to the problem raised by multilateral treaties.

<sup>69</sup> I.L.C. Report, note 20 above, at 12.

<sup>70</sup> The functions of the expert consultant at a U.N. codification conference are nowhere defined. In his first intervention Sir Humphrey Waldock, having adverted to this point, said "that he regarded himself as the servant of the Conference in the same way that he had served the Commission in his capacity as Special Rapporteur on the law of treaties. He was anxious to help in formulating the best possible draft convention and should not be thought of as someone who was attending the Conference simply to defend the Commission's work." (Official Records, First Session, at 20). Sir Humphrey both answered questions on the draft articles and proposed amendments, and commented, as circumstances required, on issues raised in the debates.

<sup>71</sup> Official Records, First Session 104.

<sup>72</sup> *Ibid.* at 106.

<sup>73</sup> 29 A. J. I. L. Supp. 653, at 659-660 (1935), Arts. 14, 15 and 16.

<sup>74</sup> (First Report), note 15 above, at 223.

<sup>75</sup> (First Report), note 16 above, at 91-92, 124.

In its 1951 advisory opinion the International Court of Justice found that the unanimity principle had not been "transformed into a rule of law."<sup>76</sup> It went on to state that with respect to the Genocide Convention, if a reservation was compatible with the object and purpose of the convention, it should be permitted. The Court's opinion was but one factor in the Commission's decision to abandon the unanimity rule. Equally important were the evidence of an increasing predilection of states to formulate reservations to multilateral treaties and the pressures in the General Assembly to have the United Nations Secretariat employ a "flexible" system of reservations to multilateral treaties in its depositary practice.

The question of reservations to treaties was discussed in 1951 and 1952 at the Fifth and Sixth Sessions of the General Assembly and again at the Fourteenth Session in 1959. At the end of earlier debate the General Assembly adopted Resolution 598 (VI)<sup>77</sup> which requested the Secretary General as depositary of the Genocide Convention to conform with the opinion of the Court and, with respect to other future multilateral conventions of which he is depositary,

(i) to continue to act as depositary in connexion with the deposit of documents containing reservations or objections, without passing upon the legal effect of such documents; and

(ii) to communicate the text of such documents relating to reservations or objections to all States concerned, leaving it to each State to draw legal consequences from such communications.

The United States, which had urged abandonment of the unanimity doctrine in its submission in the Genocide Case, voted for the resolution. When the question of reservations to multilateral conventions was subsequently considered by the Assembly in 1959 in connection with the reservation of India to the Inter-Governmental Maritime Consultative Organization Convention, the General Assembly not only reaffirmed its 1952 directive to the Secretary General, cited above, but also extended it to cover all conventions concluded under the auspices of the United Nations prior to 1952 which did not contain contrary provisions.<sup>78</sup>

Taking as a point of departure that "what is essential to ensure both the effectiveness and the integrity of the treaty is that a sufficient number of States should become parties to it, accepting the great bulk of its provisions,"<sup>79</sup> the Commission embarked upon an examination of state practice. It found that

not infrequently a number of States have, to all appearances, only found it possible to participate in the treaty subject to one or more reservations. . . . [W]hen today the number of negotiating States may be upwards of one hundred States with very diverse cultural, eco-

<sup>76</sup> [1951] I.C.J. Rep. 15, 24.

<sup>77</sup> General Assembly Res. 598 (VI), Supp. 20 at 84, U.N. Doc. A/2119 (1952).

<sup>78</sup> General Assembly Res. 1452 B, U.N. General Assembly, 14th Sess., Official Records, Supp. 16, p. 56. See, generally, Schachter, "The Question of Treaty Reservations at the 1959 General Assembly," 54 A.J.I.L. 372 (1960).

<sup>79</sup> I.L.C. Report, note 20 above, at 38, par. 12 of the commentary.

conomic and political conditions, it seems necessary to assume that the power to make reservations without the risk of being totally excluded by the objection of one or even of a few States may be a factor in promoting a more general acceptance of multilateral treaties.<sup>80</sup>

The two basic provisions on reservations are Article 19 on formulation and Article 20 on acceptance of and objection to reservations. The former incorporates the rule in the Genocide Case; the latter the flexible approach endorsed by the General Assembly. The International Law Commission text on formulation of reservations read as follows:

A State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless:

- (a) The reservation is prohibited by the treaty;
- (b) The treaty authorizes specified reservations which do not include the reservation in question; or
- (c) In cases where the treaty contains no provisions regarding reservations, the reservation is incompatible with the object and purpose of the treaty.<sup>81</sup>

It seemed to the United States that in the case of a treaty which authorizes specified reservations a categorical rule prohibiting all other reservations was inconsistent with the goal of encouraging general acceptance of multilateral treaties. Not infrequently a point on which a state wishes to reserve may be one which the negotiators did not consider but as to which they would have authorized reservation had a negotiating state raised the matter. "... [I]n many instances the essential purpose of including a provision [authorizing reservations to particular provisions] may ... be to facilitate reservations with respect to certain provisions ... but not to exclude reservations to other provisions."<sup>82</sup>

In addition to amendments to delete paragraph (b) proposed by the United States and Colombia and the Federal Republic of Germany, omnibus amendments by Spain and the U.S.S.R. to the reservations article envisioned its deletion. Yet after an extended discussion of the subject the committee of the whole by a vote of 23 for, 53 against, with 12 abstentions, rejected deletion of the paragraph.<sup>83</sup> An additional amendment proposed by Poland<sup>84</sup> to insert the word "only" between the words "authorized" and "specified" met the problem raised by the United States and was referred to the drafting committee. Indeed, in introducing this amendment the Polish representative echoed the United States view<sup>85</sup> that the Commission's text of paragraph (b) was "unduly rigid." A number of delegations agreed with this characterization of the Commission's text and, though unwilling to excise the paragraph, favored its being expressed along the more flexible lines suggested by the Polish amendment. There was, accordingly, general support for the drafting committee text which incorporated the Polish proposal in substantially the following terms: [A

<sup>80</sup> *Ibid.*

<sup>81</sup> *Ibid.* at 35.

<sup>82</sup> I Analytical Compilation 147; cf. Official Records, First Session 108.

<sup>83</sup> *Ibid.* at 135.

<sup>84</sup> U.N. Doc. A/CONF.39/C.1/L.136.

<sup>85</sup> Official Records, First Session 108.

State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless:] "(b) the treaty provides that only specified reservations, which do not include the reservation in question, may be made. . . ." <sup>86</sup>

Paragraphs 1, 2 and 3 of Article 20 on *Acceptance of and objection to reservations* deal, respectively, with reservations expressly authorized by a treaty, reservations to certain treaties requiring acceptance by all the parties, and reservations to treaties which are constituent instruments of international organizations. Paragraph 4 deals with all other cases. It contains in subparagraphs (a), (b) and (c) "the three basic rules of the 'flexible' system which are to govern the position of the contracting States in regard to reservations to any multilateral treaties not covered by the preceding paragraphs." <sup>87</sup>

Switzerland and the United States introduced amendments <sup>88</sup> to incorporate in paragraph 4 of this article an express reference to the preceding article in order to clarify, in particular, the relationship between the substantive limitations on formulation and the procedural acts of accepting or objecting to a reservation. For example, under the proposed text, a state apparently could have accepted a reservation to a treaty that prohibits reservations, though the results of such action would have been highly problematical. These amendments were referred to the drafting committee, which declined to incorporate them in the provisional text adopted in 1963 or in the final text adopted in 1969. However, the inclusion in the introductory clause of paragraph 4 of the words "unless the treaty otherwise provides" to a considerable extent accomplishes the same objective.

Czechoslovakia introduced an amendment <sup>89</sup> to reverse the presumption in subparagraph (b) of paragraph 4 of the Commission's text that "an objection by another contracting State to a reservation precludes the entry into force of the treaty as between the objecting and reserving State unless a contrary intention is expressed by the objecting State." The same principle contained in the Czech amendment was included in broader amendments proposed by Syria and the U.S.S.R. <sup>90</sup> By a vote of 28 for, 48 against, with 8 abstentions, the committee of the whole rejected these amendments at the 1968 session. <sup>91</sup>

At the outset of the second session the Soviet Union circulated an "Explanatory Memorandum on the Question of Reservations to Multilateral Treaties." <sup>92</sup> The document asserted the traditional Soviet doctrine that "the formulation of a reservation is an act of State sovereignty and does not require acceptance by other States." The thrust of the memorandum, however, dealt with the presumption in subparagraph 4 (b) which was

<sup>86</sup> Art. 19 of the Convention. See Official Records, First Session 415 (1968), for drafting committee text.

<sup>87</sup> I.L.C. Report, note 20 above, at 39, par. 21 of commentary.

<sup>88</sup> U.N. Docs. A/CONF.39/C.1/L.97 and A/CONF.39/C.1/L.127 (1968).

<sup>89</sup> U.N. Doc. A/CONF.39/C.1/L.85 (1968).

<sup>90</sup> U.N. Docs. A/CONF.39/C.1/L.94 and A/CONF.39/C.1/L.115 (1968).

<sup>91</sup> Official Records, First Session 135.

<sup>92</sup> U.N. Doc. A/CONF.39/L.3 (1969).

characterized as "a departure from international practice" and "a patent step backward, a retrogression." The paper further asserted that the formulation adopted at the first session would "not only hamper any increase in the number of States bound to one another by future multilateral treaties, but [might] cast doubt on relations under treaties already in force." The paper concluded by re-proposing the substance of the Czech amendment.

In the relatively brief discussion of the U.S.S.R. proposal at the tenth plenary meeting on April 29, 1969, some states which had supported the International Law Commission text of paragraph 4 (b) at the first session, stated that, upon further reflection, they "considered the text approved by the committee of the whole" as "inadequate" and "would accordingly vote for the Soviet amendment."<sup>93</sup> Other states professed an equal willingness to accept either the International Law Commission text or the U.S.S.R. formulation.<sup>94</sup> In his summary statement preceding the vote, Sir Humphrey Waldock, the expert consultant, concluded on the following note:

... as some delegates had pointed out, the problem was merely that of formulating a rule one way or the other. The essential aim was to have a stated rule as a guide to the conduct of States, and from the point of view of substance it was doubtful if there was any very great consideration in favour of stating the rule in one way rather than the other, provided it was perfectly clear. The International Law Commission had discussed various possible ways of formulating the rule; it had not considered that any great question of substance was at issue. The aim had been to find what was the normal intention to attribute to a State. It would appear that the views of members of the International Law Commission and of delegations had been evolving over the past seven or eight years. What was required now was to determine the general sense of the conference regarding the rule it would prefer to include in the convention.<sup>95</sup>

In the ensuing vote the plenary adopted the U.S.S.R. amendment by a vote of 49 for, 21 against, with 30 abstentions,<sup>96</sup> slightly more than the two-thirds majority required under the conference rules. Consequential changes were made in paragraph 3 of Article 21.<sup>97</sup>

Paragraph 5 of Article 20 provides: "... unless the treaty otherwise provides, a reservation is considered to have been accepted by a State if it shall have raised no objection to the reservation by the end of a period of twelve months after it was notified of the reservation or by the date on which it expressed its consent to be bound by the treaty, whichever is later." The Commission's commentary cites examples of similar provisions—though for shorter time periods—in existing multilateral conventions and the 1959 Recommendation of the Inter-American Council of Jurists endorsing a one-year rule.<sup>98</sup> The establishment of a cut-off date seems desirable

<sup>93</sup> U.N. Doc. A/CONF.39/SR.10 at 15 (Mexico) (1969).

<sup>94</sup> *Ibid.* at 21–22 (Jamaica); at 25 (U.K.).

<sup>95</sup> *Ibid.* 24.

<sup>96</sup> U.N. Doc. A/CONF.39/SR.10 at 25 (1969).

<sup>97</sup> See U.N. Doc. A/CONF.39/L.49 (1969).

<sup>98</sup> I.L.C. Report, note 20 above, at 40.

in principle; many states have already developed procedures for early consideration of reservations to insure against timely failure to object.

In concluding his 1961 lectures on "Reservations to Treaties" at the Hague Academy of International Law, Professor William W. Bishop, Jr., noted that the traditional unanimity rule had been giving way to the flexible system ultimately proposed by the Commission. Although "the older requirement" was "simpler and easier to work with," it had "not satisfied the practical needs of the world's foreign offices."<sup>99</sup> The broad general agreement on the Commission's approach confirms the accuracy of Professor Bishop's observation and affords substantial evidence that the reservations articles fairly reflect contemporary international treaty practice.

Article 24 on *Entry into force* contains a sensible addition to the customary rules on that subject. It specifies that provisions which necessarily require action before the entry into force of the treaty itself, such as those relating to depositary functions, "apply from the time of the adoption of its text."<sup>100</sup>

In his first report in 1956 Sir Gerald Fitzmaurice included the following language in his proposed article on entry into force:

. . . A treaty may, however, provide that it shall come into force provisionally on a certain date, or upon the happening of a certain event, such as the deposit of a specified number of ratifications. In such cases an obligation to execute the treaty on a provisional basis will arise, but, subject to any special agreement to the contrary, will come to an end if final entry into force is unreasonably delayed or clearly ceases to be probable.<sup>101</sup>

In view of his election to the Court and the pressure for work on other topics, the Commission took no action with respect to the Fitzmaurice proposal. In 1962 Sir Humphrey Waldock proposed a separate article along the lines suggested by Fitzmaurice.<sup>102</sup> The Commission adopted the article after a thorough discussion of state practice had established that the practice had become reasonably common<sup>103</sup> and was continuing to expand, particularly in the area of trade agreements.

At the second reading of the article in 1965, Messrs. Briggs, Lachs, Reuter and Verdross stated that it was not quite accurate to speak of provisional entry into force.<sup>104</sup> In their view states agreed to the provisional application of a treaty rather than to its provisional entry into force. Several members of the Commission also made the point that there was a gap in the article, since no provision was made for termination of provisional entry

<sup>99</sup> 103 *Recueil des Cours de l'Académie de Droit International* 337 (1961, II).

<sup>100</sup> Par. 4.

<sup>101</sup> Fitzmaurice, note 17 above, at 116, par. 1 of article on "Entry into force (Legal effects)."

<sup>102</sup> 1962 I.L.C. Yearbook (I) 259, U.N. Doc. A/CN.4/Ser. A/1962.

<sup>103</sup> Sir Humphrey Waldock subsequently stated: "The Commission as a whole appeared to be firmly of the opinion that it was dealing with a common phenomenon which had become an ordinary part of existing treaty practice." 1965 I.L.C. Yearbook (I) 112, 113, U.N. Doc. A/CN.4/Ser. A/1965.

<sup>104</sup> *Ibid.* at 106-108.



into force. Despite these doubts as to the formulation of the rule, an article along the lines proposed by the special rapporteur was adopted by a vote of 17-0.<sup>105</sup>

The issues raised in the Commission were re-examined at the first session of the conference in Vienna, where nine amendments to the article were introduced; three of these were adopted by the committee of the whole or incorporated in the final article by the drafting committee. A major improvement was acceptance of the view that the treaty did not enter into force provisionally but was applied provisionally. In the committee of the whole Mr. Charles I. Bevans stated that the United States favored deletion of the article on "provisional entry into force" which "merely affirmed a procedure which was possible in the absence of the article . . . [and which] . . . left unanswered the question how provisional force might be terminated."<sup>106</sup> He added that if, however, the article

was to be retained, the United States delegation would wish to have it amended as follows: first, the words "be applied" should be substituted for "enter into force" in the introductory clause of paragraph 1, the words "shall be applied" for "shall enter into force" in paragraph 1, sub-paragraph (a), and "application" for "entry into force" in paragraph 2. Secondly, a paragraph on the termination of the provisional application of the treaty should be added along the following lines:

"Provisional application of a treaty or part of a treaty may terminate as agreed by the States concerned or upon notification by one of those States to the other State or States that it does not intend to become definitively bound by the treaty."<sup>107</sup>

As the debate continued it became clear that most other delegations shared our concern as to the formulation of the rule but were not prepared to support deletion. Accordingly, the United States proposal for deletion was not pressed to the vote. Either, the delegation supported the amendments of Yugoslavia<sup>108</sup> and Belgium<sup>109</sup> to effect the changes described in the United States statement. Both were adopted by a wide margin. The text of Article 25 recommended by the committee of the whole was adopted by a vote of 87-1-14 at the second session.<sup>110</sup>

Paragraph 1 of Article 25 in no way requires a state to agree to provisional application of a treaty. If, however, a state does agree to apply a treaty provisionally pending its entry into force, it may, unless it has agreed otherwise, terminate provisional application by notifying other states which are provisionally applying the treaty that it does not intend to become a party.

<sup>105</sup> *Ibid.* at 285.

<sup>106</sup> Official Records, First Session 140.

<sup>107</sup> *Ibid.*

<sup>108</sup> U.N. Doc. A/CONF.39/C.1/L.185 (dealing with provisional application) (1968).

<sup>109</sup> U.N. Doc. A/CONF.39/C.1/L.194 (adding new paragraph on termination) (1968).

<sup>110</sup> U.N. Doc. A/CONF.39/SR.11, at 24 (1969).

OBSERVANCE, APPLICATION AND INTERPRETATION OF TREATIES  
(ARTICLES 26-38)

Part III of the convention deals with the Observance, Application, and Interpretation of Treaties. The defeat of an attempt to weaken the rule of *pacta sunt servanda* was the most significant action taken by the conference with respect to this part.

The foundation upon which the treaty structure is based is the principle that states must carry out their treaty obligations. The Commission's formulation of this principle was lapidary: "Every treaty in force is binding upon the parties to it and must be performed by them in good faith." Nonetheless, Bolivia, Czechoslovakia, Ecuador, Spain and Tanzania jointly proposed replacing the expression "Every treaty in force" by the words "Every valid treaty."<sup>111</sup> Congo (Brazzaville) proposed redrafting Article 26 to read as follows:

1. Treaties which have been regularly concluded and have entered into force are binding upon the parties and must be performed in good faith.
2. Good faith is presumed.<sup>112</sup>

Cuba proposed adding after the phrase "in force" the words "in conformity with the provisions of the present Convention."<sup>113</sup>

In the discussions, all of the proponents of amendments stressed their devotion to the principle of *pacta sunt servanda* and urged that the changes proposed were merely clarifications. With the exception of Congo (Brazzaville) and Tanzania, however, each of the states proposing an amendment is involved in a territorial dispute that concerns the continuing validity of treaty obligations.

In urging adoption of the International Law Commission text, Professor Briggs pointed out to the committee that the Commission had dealt with validity of treaties in Part V. He urged that "it would serve no purpose" to insert the word "valid" in Article 26. Indeed, "it might encourage States mistakenly to claim a right of non-performance before any invalidity had been established." As for the amendment submitted by the Congo, he stated that it "weakened the rule in article 26 by casting doubt *ab initio* on every treaty. . . ." <sup>114</sup>

A majority of delegations supported the International Law Commission text but were anxious to avoid forcing a vote. The sponsors of the amendments did not wish to have them voted down. Accordingly, the committee adopted the principle of the International Law Commission text and referred all amendments to the drafting committee,<sup>115</sup> a method which on some occasions was described by Chairman Elias as putting the amendments in the refrigerator. When the article was reported out in its original

<sup>111</sup> U.N. Doc. A/CONF.39/C.1/L.118 (1968).

<sup>112</sup> U.N. Doc. A/CONF.39/C.1/L.189 (1968).

<sup>113</sup> U.N. Doc. A/CONF.39/C.1/L.173 (1968).

<sup>114</sup> Official Records, First Session 151.

<sup>115</sup> *Ibid.* at 158.

form, it was approved without vote. In the twelfth plenary meeting it was adopted by 96 votes to none.<sup>116</sup>

A new article (27) on internal law and observance of treaties was proposed by Pakistan<sup>117</sup> and supported by a substantial group of states. It provides that a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This is a restatement of a long-standing principle of customary international law. The Harvard Draft had provided:

Unless otherwise provided in the treaty itself, a State cannot justify its failure to perform its obligations under a treaty because of any provisions or omissions in its municipal law, or because of any special features of its governmental organization or its constitutional system.<sup>118</sup>

Section 140 of the *Restatement of the Foreign Relations Law of the United States* provides:

The duty of a state to give effect to the terms of an international agreement to which it is a party, as stated in § 138, is not affected by a provision of its domestic law that is in conflict with the agreement or by the absence of domestic law necessary for it to give effect to the terms of the agreement.<sup>119</sup>

The Commission had not included the principle in its draft articles because it considered the point to fall within the law of state responsibility rather than the law of treaties.<sup>120</sup> In explaining its vote in favor of Article 27 the U.S. Delegation observed:

There is a hierarchy of differing legal rules in the internal legislation of most States. Constitutional provisions are very generally given primacy. Statutes, resolutions, and administrative provisions, all of which may be authoritative, may have different weights. Treaty provisions, when viewed as internal law, necessarily have to be fitted into that hierarchy.<sup>121</sup>

Article 30 grapples with the thorny problem of successive treaties relating to the same subject matter. Because it was necessary to deal with a variety of disparate situations, the article is somewhat long and complicated. In essence it provides that: (a) if a treaty says it is subject to another treaty, the other treaty governs on any issue of compatibility; (b) as between parties to one treaty who become parties to a second, the second governs on any point where it is incompatible with the first; (c) if some of the parties to the first treaty are not parties to the second treaty, and vice versa, the first governs between a party to both and a party only to the first; the second governs between a party to both and a party only to the second.

<sup>116</sup> U.N. Doc. A/CONF.39/SR.12, at 15 (1969).

<sup>117</sup> U.N. Doc. A/CONF.39/C.1/L.181 (1968).

<sup>118</sup> 29 A. J. I. L. Supp. 653, at 662 (1935), Art. 23, "Excuses for failure to perform."

<sup>119</sup> Restatement, note 39 above, at 430.

<sup>120</sup> Official Records, First Session 158 at par. 73 (Sir Humphrey Waldock).

<sup>121</sup> U.N. Doc. A/CONF.39/SR.13, at 3 (1969).

In formulating these proposals the Commission had been troubled by how to deal with a second treaty which involved a breach of the first treaty. Lauterpacht had suggested that in such circumstances the second treaty should be considered void.<sup>122</sup> Fitzmaurice posited invalidity on narrower grounds<sup>123</sup>—prohibition in the first treaty of an inconsistent second treaty or a direct breach of the first treaty necessarily occasioned by the second treaty. These proposals were substantially akin to Article 22 of the Harvard Draft,<sup>124</sup> although that article speaks of frustration of the purpose of the first treaty.

Waldock abandoned the invalidity aspect, pointing out that the jurisprudence of the Permanent Court, particularly in the *Oscar Chinn* and *European Commission of the Danube* cases, had rejected inconsistency as a ground of invalidity.<sup>125</sup> He was also impelled by the practical difficulties of defining the circumstances that would support a claim of invalidity in cases of successive treaties. This viewpoint prevailed both in the Commission and in the conference, and the article was debated and adopted without doctrinal disputes.<sup>126</sup>

The net effect of Article 30 is to lay down a series of principles of interpretation to determine priorities among incompatible obligations. It leaves the consequences of assigning the priorities aside. As the commentary to the Commission's draft articles points out,

The rules . . . determine the mutual rights and obligations of the . . . parties merely *as between themselves*. They do not relieve any party to a treaty of any international responsibilities it may incur by concluding or by applying a treaty the provisions of which are incompatible with its obligations towards another State under another treaty.<sup>127</sup>

Nevertheless, the convention does not relegate this problem of incompatibility completely to the realm of state responsibility. Paragraph 5 of the article, while specifically reserving the question of state responsibility, also reserves as to the application of Article 41, which relates to agreements to modify multilateral treaties between certain of the parties only.

The articles on interpretation demonstrate that a quite conservative (even old-fashioned) series of rules would be accepted by the conference if endorsed by the Commission. Articles 31 and 32 deal, respectively, with the general rule and supplementary means of interpretation. The Commission's formulation established a hierarchy of sources in which primacy was accorded to the text.<sup>128</sup>

<sup>122</sup> Lauterpacht, (First) Report on the Law of Treaties, note 16 above, at 156 (1953) (Art. 16, par. 1).

<sup>123</sup> Fitzmaurice, Third Report on the Law of Treaties, 1958 I.L.C. Yearbook (II) 27, U.N. Doc. A/CN.4/115 (1958) (Art. 18, par. 8).

<sup>124</sup> 29 A. J. I. L. Supp. 653, at 661-662 (1935).

<sup>125</sup> Waldock, Second Report on the Law of Treaties, 1963 I.L.C. Yearbook (II) 56-59, U.N. Doc. A/CN.4/156 and Add.1-3 (1963).

<sup>126</sup> Official Records, First Session 164-166.

<sup>127</sup> I.L.C. Report, note 20 above, at 48.      <sup>128</sup> *Ibid.* 49 (par. 2 of commentary).

Paragraph 1 of Article 31 requires that a treaty be "interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and the light of its object and purpose." Context is narrowly defined as comprising, "in addition to the text, including its preamble and annexes," related agreements made by all the parties and instruments made by less than all the parties but accepted by all as related to the treaty.<sup>129</sup> Paragraph 3 of Article 31, listing elements "extrinsic to the text" which shall be "taken into account" in interpretation, is limited to subsequent agreements between the parties, subsequent practice establishing agreement and relevant rules of international law.

Article 32 allows "supplementary means of interpretation" to be resorted to, "including preparatory work on the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable."

A member of the Commission has observed that the method of presentation in both Articles 31 and 32 "is designed to stress the dominant position of the text itself in the interpretative process."<sup>130</sup>

In the Commission Messrs. Briggs,<sup>131</sup> El Erian,<sup>132</sup> Rosenne<sup>133</sup> and Tsuruoka<sup>134</sup> supported a proposal to combine the substance of Articles 31 and 32 into a single article. In addition, Mr. Bartoš<sup>135</sup> stated that he was inclined to favor the proposal, and Mr. Amado that he had no strong feelings either way. Among the governments which in their comments on the Commission's articles criticized treating the *travaux préparatoires* as a secondary means of interpretation were Hungary<sup>136</sup> and the United States.<sup>137</sup>

In light of the division in the Commission on the subject, the expressions of concern in governmental comments, and the traditional United States position in favor of according equal weight to *travaux*, the United States formally proposed an amendment, the principal objective of which was to eliminate the hierarchy between the sources of evidence for interpretation of treaties by combining the articles containing the general rule and the supplementary means of interpretation:

A treaty shall be interpreted in good faith in order to determine the meaning to be given to its terms in the light of all relevant factors, including in particular:

- (a) the context of the treaty;
- (b) its objects and purposes;
- (c) any agreement between the parties regarding the interpretation of the treaty;

<sup>129</sup> Par. 2.

<sup>130</sup> Rosenne, "Interpretation of Treaties in the Restatement and the International Law Commission's Draft Articles: A Comparison," 5 Col. J. Transnat'l. Law 205, 221 (1966).

<sup>131</sup> 1966 I.L.C. Yearbook (I, Pt. II) 187, 202, U.N. Doc. A/CN.4/Ser. A/1966.

<sup>132</sup> *Ibid.* at 204.

<sup>133</sup> *Ibid.* at 187, 205.

<sup>134</sup> *Ibid.* at 200.

<sup>135</sup> *Ibid.* at 202.

<sup>136</sup> Analytical Compilation, note 27 above, at 201-202.

<sup>137</sup> *Ibid.* at 203.

- (d) any instrument made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty;
- (e) any subsequent practice in the application of the treaty which establishes the common understanding of the meaning of the terms as between the parties generally;
- (f) the preparatory work of the treaty;
- (g) the circumstances of its conclusion;
- (h) any relevant rules of international law applicable in the relations between the parties;
- (i) the special meaning to be given to a term if the parties intended such term to have a special meaning.

In introducing the amendment<sup>138</sup> Professor McDougal adverted to the practice of Ministries of Foreign Affairs in looking at the *travaux* when considering a problem of treaty interpretation and to the practice of international tribunals, as illustrated by the *Lotus* case, of looking at the preparatory work before reaching a decision on the interpretation of a treaty described as "sufficiently clear in itself."<sup>139</sup>

In the ensuing debate in the committee of the whole, the U.S. amendment received scant support. A principal source of arguments against it was the 1950 debates in the Institute of International Law which had adopted the textual approach. Fear was expressed that "too ready admission of the preparatory work" would afford an opportunity to a state which had "found a clear provision of a treaty inconvenient" to allege a different interpretation "because there was generally something in the preparatory work that could be found to support almost any intention."<sup>140</sup> Other arguments advanced included the assertion that recourse to *travaux* would favor wealthy states with large and well-indexed archives, fear that non-negotiating states would hesitate to accede to multilateral conventions, since they could hardly be aware of or wish to have their rights based on recourse to the *travaux*, and the characterization of the International Law Commission text as a "neutral and fair formulation of the generally recognized canons of treaty interpretation." Given the tenor of the debate, the rejection of the amendment was a foregone conclusion.

The adoption by the conference of two articles which the United States viewed as somewhat archaic and unduly rigid does not seriously weaken the value of the convention. It seems unlikely that Foreign Offices will cease to take into consideration the preparatory work and the circumstances of the conclusion of treaties when faced with problems of treaty interpretation, or that international tribunals will be less disposed to consult Article 32 sources in determining questions of treaty interpretation.<sup>141</sup>

<sup>138</sup> U.N. Doc. A/CONF.39/C.1/L.156 (1968).

<sup>139</sup> Official Records, First Session 167.

<sup>140</sup> *Ibid.* 170, Jiménez de Aréchaga (Uruguay) citing the remarks of Sir Eric Beckett in the Institute's debates.

<sup>141</sup> Cf. Gross, "Treaty Interpretation: The Proper Role of an International Tribunal," 1969 Proceedings, American Society of International Law 108, 117.

The reaction of the conference to a United States amendment<sup>142</sup> to Article 33, which deals with interpretation of plurilingual treaties, was more favorable. The amendment was referred to the drafting committee, which incorporated it in paragraph 4. The new rule provides that when a treaty has been authenticated in two or more languages, neither of which has been accorded priority, and a difference in meaning persists after recourse to the other articles on interpretation, "the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted."

Articles 34 through 38 deal with treaties and third states. The first three of these derive from the principle *pacta tertiis nec nocent nec prosunt*; treaties neither impose any burdens nor confer any benefits upon third states.

Article 18 of the Harvard Draft formulated the rule somewhat more succinctly than the International Law Commission:

(a) A treaty may not impose obligations upon a State which is not a party thereto.

(b) If a treaty contains a stipulation which is expressly for the benefit of a State which is not a party or a signatory to the treaty, such State is entitled to claim the benefit of that stipulation so long as the stipulation remains in force between the parties to the treaty.<sup>143</sup>

The commentary explains why the Commission found it necessary to treat the topic in three articles. Members of the Commission were agreed that the *pacta tertiis* rule was well established in international law. All members shared the view that there are no exceptions to the rule as regards obligations, but there was a difference of opinion as to whether a treaty may of its own force confer rights upon a non-party. The Commission decided, therefore, to express the general principle in Article 34 and to deal separately in Articles 35 and 36<sup>144</sup> with treaties imposing obligations on third states and those granting rights to such states.<sup>145</sup>

The comments of governments on these three articles were generally laudatory. The new states, in particular, underlined the importance of the principles which they express.

Two significant attempts were made to change these articles at the first session of the conference. Venezuela proposed combining them into the first paragraph of a single article dealing with treaties and third states.<sup>146</sup> The Venezuelan amendment would have required "express consent" of third states both to treaties establishing obligations and to those conferring benefits. In light of the hostile reaction to this proposal, it was withdrawn.

Finland proposed deleting the second sentence of paragraph 1 of Article 36, which would have eliminated the presumption that a third state assented to a right provided for in a treaty "so long as the contrary [was] not in-

<sup>142</sup> U.N. Doc. A/CONF.39/C.1/L.197 (1968).

<sup>143</sup> 29 A. J. I. L. Supp. 653 at 661 (1935).

<sup>144</sup> The formulation of Art. 36 was calculated to avoid doctrinal arguments as to whether the institution of *stipulation pour autrui* is recognized in international law. I.L.C. Report, note 20 above, at 59.

<sup>145</sup> *Ibid.* at 57.

<sup>146</sup> U.N. Doc. A/CONF.39/C.1/L.305/Rev.1 (1968).

cicated.”<sup>147</sup> The Finnish proposal was defeated by a vote of 25 for, 46 against, with 17 abstentions.

Article 37, which deals with the position of third states with respect to revocation or modification of rights or obligations, was adopted without difficulty. It is interesting to compare the rule in Article 37 with that adopted by the American Law Institute in the *Restatement of Foreign Relations Law of the United States*.<sup>148</sup>

According to the International Law Commission's commentary, the purpose of the final article on treaties and third states was to include a “general reservation stating that nothing in [the preceding articles in that section] precludes treaty rules from becoming binding on non-parties as customary rules of international law.”<sup>149</sup> The Commission emphasized that the provision “is purely and simply a reservation designed to negate any possible implication from articles [34] to [37] that the draft articles reject the legitimacy of the above-mentioned process.”<sup>150</sup>

At the first session of the conference the delegations of Finland and Venezuela urged deletion of the article on the ground that the matter was beyond the scope of the law of treaties. By the substantial margin of 14 for, 63 against, with 18 abstentions, the amendments were rejected.<sup>151</sup> Amendments by Syria and Mexico to add at the end of the article the words “recognized as such” and “or as a general principle of law” were adopted; the former by a vote of 59 for, 15 against, with 17 abstentions; the latter by a vote of 38 for, 28 against, with 28 abstentions.<sup>152</sup> The resulting text,<sup>153</sup> which reads as follows, received careful scrutiny at the second session:

Nothing in articles [34] to [37] precludes a rule set forth in a treaty from becoming binding upon a third State as a customary rule of international law, recognized as such, or as a general principle of law.

A number of delegates pointed out that the words “or as a general principle of law” created substantial difficulty and urged their deletion. In an unusual action, the plenary then reversed the committee of the whole and deleted the words added by the Mexican amendment by a vote of 50 to 27, with 19 abstentions. Immediately thereafter, it adopted the amended text by a substantial majority.<sup>154</sup>

<sup>147</sup> U.N. Doc. A/CONF.39/C.1/L.141 (1968).

<sup>148</sup> § 156. Consent of Parties

An international agreement may be modified, suspended, or terminated by the consent of the parties, except that when an international agreement confers a right, as indicated in § 139, upon a state not a party to the agreement, the consent of that state is required for the modification, suspension, or termination of the right, if either

(a) the agreement provides for acceptance of the right and it has been accepted, or

(b) there is no such provision but the state has changed its position in reliance upon the continuing existence of the right and its modification, suspension, or termination would be a substantial detriment to the state.

<sup>149</sup> I.L.C. Report, note 20 above, at 61.      <sup>150</sup> *Ibid.*

<sup>151</sup> Official Records, First Session 201.      <sup>152</sup> *Ibid.*

<sup>153</sup> *Ibid.* at 444.

<sup>154</sup> U.N. Doc. A/CONF.39/SR.15, at 17 (1969).



In view of the traditional Soviet view of international custom, few delegates can have been surprised when the Soviet representative proceeded to explain that "his delegation had voted for article 38 on the understanding that a rule set forth in a treaty could become binding on a third State as a customary rule [only] if the third State recognized that rule and accepted it as binding."<sup>155</sup>

A number of governments in their comments on the International Law Commission's articles on treaties and third states stated that the rule in Article 35 should not apply with respect to treaty provisions imposed upon an aggressor state in consequence of action taken with respect to such states in conformity with the Charter of the United Nations. A similar point was made with respect to the rule in Article 52 on coercion of a state by the threat or use of force. The point was noted in the Commission's commentary to each of those articles. To deal with these problems Sir Humphrey Waldock proposed a new article. Although some members of the Commission questioned the need for a general reservation to deal with treaties imposing an obligation on an aggressor state "in consequence of measures taken in conformity with the Charter of the United Nations with reference to that State's aggression," a majority of the Commission concluded that such a reservation would serve a useful purpose. Amendments<sup>156</sup> proposed by Japan and Thailand which would have deleted the word "aggressor" were defeated by lopsided majorities and the substance of the Commission's text adopted as Article 75.

#### AMENDMENT AND MODIFICATION OF TREATIES (ARTICLES 39-41)

Article 40 on the amendment of multilateral treaties provides needed clarification in an area of treaty law in which there had been a good deal of custom but relatively little formulation of customary international law. The Harvard Draft, for example, has no provisions regarding amendment, and the subject is not even mentioned in the Eighth Edition of Oppenheim's *International Law* (1955). As the Commission's commentary points out, "the development of international organization and the tremendous increase in multilateral treaty-making have made a considerable impact on the process of amending treaties."<sup>157</sup> A mere glance at the maze of supplementary protocols, declarations of rectification and implementing agreements spawned by the General Agreement on Tariffs and Trade is convincing proof.

Article 40 provides residuary rules that safeguard the rights of parties to a treaty to participate in the amending process by requiring notification to all parties of any proposed amendment and by specifying their right to participate in the decision to be taken on the proposal and in the negotiation and conclusion of any amendatory agreement. The right to become party to the new agreement is also extended to every state entitled to become a party to the treaty.

<sup>155</sup> *Ibid.*; cf. Official Records, First Session 201 (Mr. Khlestou).

<sup>156</sup> U.N. Docs. A/CONF.39/C.1/L.366 and A/CONF.39/C.1/L.367 (1968).

<sup>157</sup> I.L.C. Report, note 20 above, at 62.

Paragraphs 4 and 5 contain a much needed clarification of the relationships between the various parties to an original treaty and a series of amending agreements, particularly with regard to a state that becomes a party to an amended treaty. In that case, the state, unless it expresses a different intention, becomes both a party to the treaty as amended and a party to the unamended treaty vis-à-vis any party to the treaty not bound by the amendment.

The distinction between Article 40 on amendments and Article 41 on modification is based upon whether the proposal to change the treaty is directed to all the parties or only a part of them. The Commission's rationale for Article 41 was that it dealt not with the amendment of a treaty but with an *inter se* agreement "in which two or a small group of parties set out to modify the treaty between themselves alone without giving the other parties the option of participating in it. . . ." <sup>158</sup> The commentary indicates considerable dubiety in the Commission regarding such agreements: "An *inter se* agreement is more likely [than an amendment] to have an aim and effect incompatible with the object and purpose of the treaty. History furnishes a number of instances of *inter se* agreements which substantially changed the régime of the treaty and which overrode the objections of interested States. . . ." <sup>159</sup> Reflecting this view, Article 41 provides:

1. Two or more of the parties to a multilateral treaty may conclude an agreement to modify the treaty as between themselves alone if:
  - (a) the possibility of such a modification is provided for by the treaty; or
  - (b) the modification in question is not prohibited by the treaty and:
    - (i) does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations;
    - (ii) does not relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole.

Moreover, paragraph 2 lays down the procedural requirement that the parties contemplating such a modification agreement must notify the other parties to the treaty of their "intention" to conclude the agreement and what the "modification" is, unless the treaty itself dispenses with the requirement. This cautionary approach is a reasonable one, even though the vast majority of *inter se* agreements are unexceptionable. As Jiménez de Aréchaga, the distinguished Uruguayan jurist, pointed out in the committee of the whole, regional arrangements are an important example of *inter se* agreements:

In technical conventions, such as those on air navigation or postal relations, the *inter se* procedure had become a necessity of everyday international life and to prohibit such agreements, or render them unnecessarily difficult, would give to a single party a right of veto in matters when there was a genuine need to keep abreast of developments.<sup>160</sup>

<sup>158</sup> *Ibid.* at 65.

<sup>159</sup> *Ibid.*

<sup>160</sup> Official Records, First Session 206.

The strict limitations on action listed in Article 41 do not apply if the action to amend is instituted under Article 40. Some concern was expressed in the committee of the whole that selection of the one or the other approach might be based upon an intent to avoid a particular procedural requirement.<sup>161</sup> The likelihood appears small, however, and while there may be some overlapping of amendments and modifications, the basic distinction is fair and workable.

The only instance in which the conference completely deleted one of the Commission's draft articles was in connection with the articles on amendment and modification. The International Law Commission had proposed an article on modification of treaties by subsequent practice.<sup>162</sup> The text read as follows:

A treaty may be modified by subsequent practice in the application of the treaty establishing the agreement of the parties to modify its provisions.

In its commentary on the article, the Commission relied for precedent upon the 1963 decision in the arbitration between France and the United States regarding the interpretation of the bilateral 1946 Air Transport Services Agreement.<sup>163</sup> The tribunal, in language quoted in the commentary, speaks of a modification by practice at the outset of its consideration of the effect of the parties' actions on Pan American's right to serve Tehran. In concluding its consideration of this aspect of the case, however, the tribunal, in affirming the right, said that the right was accorded "by virtue of an agreement that implicitly came into force at a later date" than the 1946 Agreement.<sup>164</sup> This would seem to lean toward an amendment rather than a modification approach. It might be noted that in discussions in the Commission, support for the position was based upon the *Temple of Preah Vihear* case,<sup>165</sup> although the Court's decision does not go into any discussion of a modification-by-practice theory.

Substantial concern over the unpredictable effects of the article was expressed in the committee of the whole. The U.S. Delegation urged deletion of the article. It voiced concern that relatively low-ranking officials might interpret a treaty erroneously and follow a course of conduct which, unknown to governments, could lead to modification of the treaty. Some of the African states also expressed concern. On a roll-call vote, 54 states voted for deletion of the article; only 15 voted for its retention.<sup>166</sup>

#### INVALIDITY, TERMINATION AND SUSPENSION OF THE OPERATION OF TREATIES (ARTICLES 42-72)

In dealing with Part V on the Invalidity, Termination and Suspension of the Operation of Treaties, the concern of former colonies that changes in the

<sup>161</sup> Cf. remarks of the French representative (de Bresson) *ibid.*

<sup>162</sup> I.L.C. Report, note 20 above, at 65.

<sup>163</sup> Digested in 58 A.J.I.L. 1016 (1964); cf. 3 Int. Legal Materials 668, 713 (1964).

<sup>164</sup> *Ibid.* at 716.

<sup>165</sup> 1966 I.L.C. Yearbook (I, Pt. II) 168, U.N. Doc. A/CN.4/Ser.A/1966.

<sup>166</sup> Official Records, First Session 207-215.

Commission's draft articles would adversely affect their interests was a formidable obstacle to improvements, particularly with respect to disputes-settlement procedures, which the United States considered were badly needed. Part V, in which the previously cited article on fraud is to be found, had occasioned the greatest difficulty in the Commission, contained the greatest number of unresolved difficulties, and had the greatest appeal to the newer states.

The expressed intention of the Commission with respect to these articles was exemplary. "As a safeguard for the stability of treaties," it wished to provide that "the validity and continuance in force of a treaty is the normal state of things which may be set aside only on the grounds and under the conditions provided for in the present articles."<sup>167</sup> The execution of the intention, however, required the Commission to produce a series of articles to deal with all the grounds on which a claim could legitimately be made that a treaty was invalid or subject to termination, denunciation, withdrawal or suspension. This required the Commission to include a variety of grounds for claiming invalidity which were essential for complete coverage but which had arisen rarely, if at all, in international law.

Nonetheless, Part V as proposed by the Commission contained a variety of safeguards to protect the stability of the treaty structure. Article 42 carries out the Commission's intention to subject all challenges of the continuing force of treaty obligations to the rules of the convention. The termination of a treaty, its denunciation or suspension, or the withdrawal of a party may take place only as a result of the application of the provisions of that treaty or of the convention.<sup>168</sup> Article 43 is a cautionary rule which makes clear that a state that sheds a treaty obligation does not escape any similar obligation to which it is subject under international law independently of the treaty.

Article 44 deals with separability of treaty provisions. Paragraph 3 requires separability with respect to certain grounds of invalidity, termination and suspension, such as error and impossibility, when the ground relates solely to particular clauses, and where criteria as to feasibility and equity are met. A United States amendment to add to those criteria the requirement that "continued performance of the remainder of the treaty would not be unjust"<sup>169</sup> was adopted. In fraud and corruption cases the complaining party is given an option, while in coercion and peremptory norm cases the treaty must be dealt with as a unit. Efforts to modify this limitation with respect to a peremptory norm that affected only a separable part of a treaty failed.

The rule in Article 45 is described in the Commission's commentary as one of "good faith and fair dealing."<sup>170</sup> The formulation proposed is derived in large part from two cases decided by the International Court of Justice, the *Arbitral Award made by the King of Spain*<sup>171</sup> and the *Temple*

<sup>167</sup> I.L.C. Report, note 20 above, at 66.

<sup>168</sup> Art. 42, par. 2.

<sup>169</sup> Official Records, First Session 389.

<sup>170</sup> I.L.C. Report, note 20 above, at 68.

<sup>171</sup> [1960] I.C.J. Rep. 213-214.

of *Preah Vihear*.<sup>172</sup> The requirements will afford substantial protection against ill-founded efforts to avoid meeting treaty obligations. A state is prohibited from claiming a treaty is invalid on grounds of lack of competence, restrictions on authority to consent, error, fraud or corruption, or from terminating or suspending the operation of a treaty on the ground of material breach or fundamental change of circumstances if, after becoming aware of the facts, it expressly agrees the treaty is valid or is to remain in effect or (and this would be the usual case) is considered to have acquiesced by reason of its conduct in the validity of the treaty or its maintenance in force or effect.<sup>173</sup> The United Kingdom representative made the point during debate in the committee of the whole that the article was concerned with acquiescence rather than estoppel. (Waldock in his second report had cast the rule in terms of preclusion or waiver.)<sup>174</sup> Consequently the principle of estoppel would apply, under customary law, "to any article of the convention except those on coercion and *jus cogens*."<sup>175</sup>

In its commentary the Commission points out the need for a rule, in addition to those providing general protection against risk of abuse of the articles in Part V, for the case in which

a State, after becoming aware of an essential error in the conclusion of the treaty, an excess of authority committed by its representative, a breach by the other party, etc., may continue with the treaty as if nothing had happened, and only raise the matter at a much later date when it desires for quite other reasons to put an end to its obligations under the treaty. The principle [in Article 45] places a limit upon the cases in which such claims can be asserted with any appearance of legitimacy.<sup>176</sup>

In order to provide further insurance against the risk of abuse, the United States joined with Guyana in proposing an amendment in the nature of a statute of limitations that would have barred a state from challenging the validity of a treaty after it had been in force for ten years.<sup>177</sup> The proposal was defeated 42 to 21, with 26 abstentions, by a combination of the votes of those states that wished to reopen or preserve old claims and the group that was opposed to changes in the Commission's text as a matter of principle. While the amendment would have been a worthwhile clarification, the principle it supports is embodied in the language of Article 45 as adopted, though with less precision.

Although the opposition of developing states to changes in the Commission's text led to the rejection of a series of amendments that the United States Delegation considered improvements, the same type of opposition led to the defeat of a series of amendments that would have impaired the value of the convention and threatened the stability of the treaty structure. An apt illustration was another amendment<sup>178</sup> to Article 45 sponsored by

<sup>172</sup> [1962] I.C.J. Rep. 23-32.

<sup>173</sup> Art. 45.

<sup>174</sup> Waldock, note 125 above, at 39-40.

<sup>175</sup> Official Records, First Session 398.

<sup>176</sup> I.L.C. Report, note 20 above, at 68-69.

<sup>177</sup> U.N. Doc. A/CONF.39/C.1/L.267 and Add.1 (1968).

<sup>178</sup> U.N. Doc. A/CONF.39/C.1/L.251 and Add. 1 to 3 (1968).

Bolivia, Byelorussia, Colombia, Congo (Brazzaville), the Dominican Republic, Guatemala, the Soviet Union and Venezuela to gut the article by deleting the rule regarding acquiescence by reason of conduct. Each of the Latin American sponsors of the amendment is involved in a boundary dispute. Spain, which put forward a more sophisticated proposal for weakening the article,<sup>179</sup> also is concerned in a territorial dispute. The eight-Power amendment was defeated 47 to 20, with 27 abstentions; the Spanish proposal, 40 to 25, with 25 abstentions.<sup>180</sup>

The appearance of the Soviet Union as a sponsor of this amendment has curious aspects. With the assortment of actual or potential territorial disputes that face the Soviet Union, its interests would apparently have been served better by supporting proposals to strengthen the conclusive effect of treaty settlements rather than joining in efforts to weaken the stability of the treaty structure. Yet in a number of instances, such as the direct assault upon Article 45, the Soviet Delegation joined in supporting proposals that would have undermined the *pacta sunt servanda* principle<sup>181</sup> and almost without exception opposed proposals that would have strengthened it.

Section 2 of Part V (Articles 46 through 53) sets forth the grounds on which claims of treaty invalidity must be based. The United States comments on the draft articles submitted to the General Assembly in 1967 underlined its concern with the high level of abstraction characteristic of the invalidity articles.<sup>182</sup> The prior discussion of Article 49 on fraud illustrates the nature of this concern. The Commission had proposed an article that left wide open the question of what constitutes fraud. The Commission's commentary frankly admitted that the scope of the concept is not the same in all systems.<sup>183</sup> The "paucity of precedents" in international law "means that there is little guidance to be found either in practice or in the jurisprudence of international tribunals as to the scope to be given to the concept."<sup>184</sup> In these circumstances, the Commission decided not to attempt to define fraud.

The decision itself was not without precedent, as Article 31 of the Harvard Draft had not defined fraud. The comment remarks that there is "... a general agreement among jurists as to the essential characteristics of fraudulent conduct. It may be said that its distinguishing characteristic is that the act was done with a willful intent to deceive another."<sup>185</sup>

The United States, in the committee of the whole, proposed adding two elements of definition to the article: reasonable reliance upon the fraudulent conduct and the material importance of the conduct in inducing the consent of the other party.<sup>186</sup> The amendment was defeated. A proposal

<sup>179</sup> U.N. Doc. A/CONF.39/C.1/L.272 (1963).

<sup>180</sup> Official Records, First Session 401.

<sup>181</sup> See, e.g., remarks by Mr. Talalaev, Official Records, First Session 152.

<sup>182</sup> II Analytical Compilation, note 27 above, at 242 (1968).

<sup>183</sup> I.L.C. Report, note 20 above, at 73. <sup>184</sup> *Ibid.*

<sup>185</sup> 29 A. J. I. L. Supp. 653, 1145 (1935).

<sup>186</sup> U.N. Doc. A/CONF. 39/C.1/L.276 (1963).

by Chile and Malaysia to delete the article as unnecessary in view of the lack of precedent was defeated by the overwhelming vote of 74 to 8.<sup>187</sup>

Article 49 was considered in the committee of the whole in conjunction with Article 50, which permits a state to invalidate its consent to be bound by a treaty if the consent was procured by the direct or indirect corruption of its representative by another negotiating state. Chile, Japan and Mexico proposed deletion of the article principally on the ground that the provision was unnecessary because it would fall within the rule on fraud.<sup>188</sup> The proposal gained some support but was defeated 61 to 28. On the other hand, Venezuela and Congo (Brazzaville) introduced amendments<sup>189</sup> to these two articles that would have made treaties procured by fraud or corruption void *ab initio* rather than voidable at the option of the injured state. These were decisively defeated. This, again, illustrated the double-edged effect of the disposition to keep the articles of the Commission in their form as drafted.

The Commission had proposed an article regarding "error in a treaty" that was adopted by the conference without change as Article 48. This article does contain a number of limitations upon invoking error in a treaty as a ground for invalidating consent to be bound. The error must relate to a fact or situation assumed by the complaining state to exist at the time of the treaty's conclusion and forming an essential basis of its consent to be bound. The complaining state is debarred if its own acts contributed to the error or if circumstances were such as to put it on notice "of a possible error." Finally, errors in the wording of the text are specifically excluded from the scope of the article.<sup>190</sup>

The commentary to the Commission's draft recognizes that attempts to invalidate treaties on the ground of error "have not been frequent. Almost all the recorded instances concern geographical errors, and most of them concern errors in maps. . . ." <sup>191</sup> The commentary then points out that in the *Eastern Greenland* and the *Temple of Preah Vihear* cases there is some discussion of error but only as *dicta* and that in the *Readaptation of the Macrommatis Jerusalem Concessions* case the holding was merely a negative one that if the error did not relate to a matter "constituting a condition of the agreement" it was not a basis for invalidation.<sup>192</sup>

The basic rule adopted by the Commission and the conference is essentially the same as that proposed in Article 29(a) of the Harvard Draft:

A treaty entered into upon an assumption as to the existence of a state of facts, the assumed existence of which was envisaged by the parties as a determining factor moving them to undertake the obligations stipulated, may be declared by a competent international tribunal

<sup>187</sup> Official Records, First Session 265.

<sup>188</sup> *Ibid.* 256-257 (remarks of Mr. Suarez on behalf of the co-sponsors).

<sup>189</sup> U.N. Docs. A/CONF.39/C.1/L.259 and Add. 1, and A/CONF.39/C.1/L.261 and Add. 1 (1968).

<sup>190</sup> Art. 79 (p. 559 below) applies to an error of the latter character.

<sup>191</sup> I.L.C. Report, note 20 above, at 72.      <sup>192</sup> *Ibid.* at 73.

or authority not to be binding on the parties, when it is discovered that the state of facts did not exist at the time the treaty was entered into.<sup>193</sup>

There are, of course, two differences. The Harvard Draft requires a tribunal and is limited to mutual mistake. Leaving the first problem aside for the moment, the view expressed in the Harvard Draft that the error must be mutual was based on an analogy drawn from private contract principles. Williston, *Corpus Juris*, and the *Restatement of the Law of Contracts* were cited as authority.<sup>194</sup>

Waldock in his second report had distinguished between mutual and unilateral error.<sup>195</sup> In this he followed the example of Fitzmaurice who had also based his position on private law concepts, particularly as expounded by Cheshire and Fifoot.<sup>196</sup> In the Commission it became clear that while the differentiation proposed was accepted to a certain extent in common law systems, it was not recognized in other legal systems. As a result the distinction was dropped.<sup>197</sup>

The United States introduced a clarifying amendment to the error article which would have required the fact or situation assumed to exist to have been of material importance to the consent to be bound. A second aspect of the proposal was designed to preclude a state from invoking an error as invalidating its consent if that state's own conduct contributed to the error, by adding to paragraph 2 the phrase "or could have avoided it by the exercise of reasonable diligence."<sup>198</sup>

Although the committee of the whole followed its customary practice in rejecting the amendments, the discussions indicated that a number of states considered the points in the United States amendments were substantially implicit in the Commission's draft.<sup>199</sup>

Not every proposal for improvement of the invalidity articles was rejected. The first of the grounds for invalidity, the effect of a limitation of internal law upon competence to conclude treaties, had been proposed by the Commission as follows:

A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation of its internal law was manifest.<sup>200</sup>

The Commission's text represents a compromise between the monist and dualist schools of thought regarding the nature of international law. If international and internal law are unitary, then violation of a domestic law restriction on capacity to make a treaty must, to a monist, invalidate the

<sup>193</sup> 29 A. J. I. L. Supp. 653, 1126 (1935).

<sup>194</sup> *Ibid.* at 1131.

<sup>195</sup> Waldock, note 125 above, at 48-50.

<sup>196</sup> Fitzmaurice, Third Report, note 123 above, at 37 (1958).

<sup>197</sup> 1963 I.L.C. Yearbook (I)43-45 (par. 60), U.N. Doc. A/CN.4/Ser.A/1963.

<sup>198</sup> U.N. Doc. A/CONF.39/C.1/L.275 (1968).

<sup>199</sup> Official Records, First Session 250-254.

<sup>200</sup> I.L.C. Report, note 20 above, at 69.



treaty. On the other hand, if the international legal order exists independently of the internal legal system, then an internal restraint can be effective only internally and cannot impair the validity of consent on the international level to a treaty.

Either view is too extreme for practical purposes and of only hypothetical value in a workaday world. The history of the article in the Commission reflects a rather uneasy movement of thought between the two extreme positions that culminated in a realistic compromise.<sup>201</sup> The process was aided by a number of analyses, principally that of Hans Blix, of the actual practice of states in applying internal rules regarding treaty-making capacity.<sup>202</sup> Blix reached the conclusion that very few internal legal requirements actually went so far as to determine what happens on an international level if those requirements are violated. He found that "(t)he bodies having apparent ability, in general, to secure the performance of treaty obligations are attributed plenary competence under international law to pledge the state."<sup>203</sup>

The Commission in its commentary concluded that its limitation of invalidity claims to cases of manifest violation of internal law was supported by the relatively small body of international adjudication that had dealt with the issue. The commentary then pointed out two additional factors of a practical character that demanded its inclusion:

When a treaty has been made subject to ratification, acceptance or approval, the negotiating States would seem to have done all that can reasonably be demanded of them in the way of taking account of each other's constitutional requirements. It would scarcely be reasonable to expect each Government subsequently to follow the internal handling of the treaty by each of the other Governments, while any questioning on constitutional grounds of the internal handling of the treaty by another Government would certainly be regarded as an inadmissible interference in its affairs. . . .

The second consideration is that the majority of the diplomatic incidents in which States have invoked their constitutional requirements as a ground of invalidity have been cases in which for quite other reasons they have desired to escape from their obligations under the treaty. . . .<sup>204</sup>

In the committee of the whole an amendment was put forward by Japan and Pakistan to delete the manifest violation limitation. This amendment, which embraced the extreme dualist position, was defeated.<sup>205</sup> Two other amendments which aided considerably in defining the effect of the article were adopted. A Peruvian proposal<sup>206</sup> requiring that the rule of internal law be of fundamental importance was accepted. The United Kingdom

<sup>201</sup> For an extended analysis of the genesis of the article see Kearney, "Internal Limitations on External Commitments—Article 46 of the Treaties Convention," 4 *International Lawyer* 1-21 (1969).

<sup>202</sup> *Treaty-Making Power* (1960).

<sup>203</sup> *Ibid.* at 393.

<sup>204</sup> I.L.C. Report, note 20 above, at 71 (pars. 8 and 9 of commentary).

<sup>205</sup> Official Records, First Session 246.

<sup>206</sup> U.N. Doc. A/CONF.39/C.1/L.228 (1968).

proposed an amendment defining a manifest violation as one that would be "objectively evident to any State dealing with the matter" in accordance with normal practice "and in good faith." This also was accepted.<sup>207</sup>

At the plenary meeting at which the improved article was adopted without any negative votes, the United States Delegation emphasized that it had supported the article on the basis that it deals solely with the conditions under which a state may invoke internal law on the international plane to invalidate its consent to be bound and that it in no way impinges on internal law regarding competence to conclude treaties.<sup>208</sup>

A minor clarifying change was made in Article 47, which deals with failure of a representative of a state to comply with a specific restriction upon his authority to express consent to a treaty. The Commission had made a claim of invalidity dependent upon whether the restriction was "brought to the knowledge of the other negotiating States" before the representative expressed consent. As a result of concern that knowledge might be defined to include "constructive knowledge," the requirement was changed to "unless the restriction was notified to the other negotiating States. . . ." <sup>209</sup>

Article 51, which voids a treaty procured through coercion of a state's representative, was adopted in the committee of the whole without change or extended discussion. The United States and Australia proposed that the injured state should have the option of determining whether the treaty should be voided, but a majority agreed with the conclusion of the Commission that the use of force was of such gravity that consent obtained thereby should be null and void.<sup>210</sup> At the eighteenth plenary meeting a minor change was made so that the article would cover forms of indirect coercion such as "threat against the next-of-kin of the representative." <sup>211</sup>

On the other hand, Article 52 on the *Coercion of a State by threat or use of force* gave rise to a major confrontation. The principle in Article 52 that treaties imposed by the threat or use of force are void was not challenged in the extended discussions that continued through five meetings of the committee of the whole. The newer states, in general, took the rule for granted; the older ones, in general, recognized the evolution described in paragraph 1 of the Commission's commentary:

(1) The traditional doctrine prior to the Covenant of the League of Nations was that the validity of a treaty was not affected by the fact that it had been brought about by the threat or use of force. However, this doctrine was simply a reflection of the general attitude of international law during that era towards the legality of the use of force for the settlement of international disputes. With the Covenant and the Pact of Paris there began to develop a strong body of opinion which held that such treaties should no longer be recognized as legally valid. The endorsement of the criminality of aggressive war in the Charters of the Allied Military Tribunals for the trial of the Axis war criminals,

<sup>207</sup> Official Records, First Session 246.

<sup>208</sup> U.N. Doc. A/CONF.39/SR.18, at 11 (1969).

<sup>209</sup> Official Records, First Session 249.

<sup>210</sup> *Ibid.* at 260-269 *passim*.

<sup>211</sup> U.N. Doc. A/CONF.39/SR.18, at 17 (1969).

the clear-cut prohibition of the threat or use of force in Article 2 (4) of the Charter of the United Nations, together with the practice of the United Nations itself, have reinforced and consolidated this development in the law. The Commission considers that these developments justify the conclusion that the invalidity of a treaty procured by the illegal threat or use of force is a principle which is *lex lata* in the international law of today.<sup>212</sup>

The initiative for amendment of Article 52 came from many of the states which for weeks had been arguing that the International Law Commission's text was sacrosanct. Afghanistan, Algeria, Bolivia, Congo (Brazzaville), Ecuador, Ghana, Guinea, India, Iran, Kenya, Kuwait, Mali, Pakistan, Sierra Leone, Syria, United Arab Republic, United Republic of Tanzania, Yugoslavia and Zambia proposed that the International Law Commission text, which provided that "a treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of the Charter of the United Nations,"<sup>213</sup> be amended by defining force to include any "economic or political pressure."<sup>214</sup>

The nineteen-state amendment was vociferously supported and vehemently attacked in the committee debate. The Commission's commentary had made it clear that the notion of pressure was not included within the meaning of the draft article:

... Some members of the Commission expressed the view that any other forms of pressure, such as a threat to strangle the economy of a country, ought to be stated in the article as falling within the concept of coercion. The Commission, however, decided to define coercion in terms of a "threat or use of force in violation of the principles of the Charter" and considered that the precise scope of the acts covered by this definition should be left to be determined in practice by interpretation of the relevant provisions of the Charter.<sup>215</sup>

The discussion in the Commission underscored this intention.<sup>216</sup>

The proponents of the amendment made it quite clear in the committee of the whole that their amendment was directed toward "economic needs." The representative of Tanzania described "the withdrawal of economic aid or of promises of aid [and] the recall of economic experts" as the type of conduct which should be prohibited.<sup>217</sup> The Algerian representative advanced the thesis:

... the era of the colonial treaty was past or disappearing, but there was no overlooking the fact that some countries had resorted to new and more insidious methods, suited to the present state of international relations, in an attempt to maintain and perpetuate bonds of subjection. Economic pressure, which was a characteristic of neo-colonialism, was becoming increasingly common in relations between certain countries and the newly independent States.

<sup>212</sup> I.L.C. Report, note 20 above, at 75.      <sup>213</sup> *Ibid.*

<sup>214</sup> U.N. Doc. A/CONF.39/C.1/L.67/Rev.1/Corr.1 (1968).

<sup>215</sup> I.L.C. Report, note 20 above, at 75.

<sup>216</sup> See, e.g., 1963 I.L.C. Yearbook (I) 211-215, U.N. Doc. A/CN.4/Ser.A/1963.

<sup>217</sup> Official Records, First Session 271.

Political independence could not be an end in itself; it was even illusory if it was not backed by genuine economic independence. That was why some countries had chosen the political, economic and social system they regarded as best calculated to overcome under-development as quickly as possible. That choice provoked intense opposition from certain interests which saw their privileges threatened and then sought through economic pressure to abolish or at least restrict the right of peoples to self-determination. Such neo-colonialist practices, which affected more than two-thirds of the world's population and were retarding or nullifying all efforts to overcome under-development, should therefore be denounced with the utmost rigour.<sup>218</sup>

Statements of this character reinforced the already deep misgivings as to the effect of the amendment held by the states concerned with the stability of treaties.

The scope of the phrase "threat or use of force" in Article 2, paragraph 4, of the United Nations Charter, as is well known, has been for many years the source of acrimonious dispute. The legislative history of the San Francisco Conference is clear as to its original intent. The Chilean delegate made that point:

... The Brazilian delegation to the 1945 San Francisco Conference had proposed the inclusion of an express reference to the prohibition of economic pressure, and its proposal had been rejected. Consequently, any reference to the principles of the Charter in that respect must be a reference to the kind of force which all the Member States had agreed to prohibit, namely, physical or armed force.<sup>219</sup>

The discussions were complicated by the fact that the United Nations Special Committee on Principles of International Law concerning Friendly Relations and Cooperation Among States had been studying the "threat or use of force" issue since 1964, and action by the Conference could only cut across the deliberations of that body. The question was also raised whether the conference was attempting to amend the United Nations Charter.<sup>220</sup> The basic problem was well summed up by the Dutch representative:

In itself, the rule stated in article [52] was perfectly clear and precise. He supported the principle underlying the article, namely, the principle that an aggressor State should not, in law, benefit from a treaty it had forced its victim to accept. Nevertheless, it must be borne in mind that there was a fundamental difference of opinion as to the meaning of the words "threat or use of force" in Article 2, paragraph 4, of the United Nations Charter. If those words could be interpreted as including all forms of pressure exerted by one State on another, and not just the threat or use of armed force, the scope of article [52] would be so wide as to make it a serious danger to the stability of treaty relations.<sup>221</sup>

The course of the debate had made it clear that if the amendment were put to the vote it would carry by quite a substantial majority. On the other hand, in private discussions it had been made quite clear to the proponents that adoption could wreck the conference because states concerned with the stability of treaties found the proposal intolerable.

<sup>218</sup> *Ibid.* at 276.

<sup>220</sup> *Ibid.* at 283.

<sup>219</sup> *Ibid.* at 285.

<sup>221</sup> *Ibid.* at 275.

To reduce tension, discussion of the article was adjourned and private negotiations resorted to. A compromise solution was reached after some days of cooling off. The amendment was withdrawn. In its place, a draft declaration condemning threat or use of pressure in any form by a state to coerce any other state to conclude a treaty was unanimously adopted by the committee.<sup>222</sup> Although at one point during the plenary it appeared that the compromise might be unraveling, it was adhered to by both sides. The declaration finally approved by the conference in 1969 is annexed to the Final Act.<sup>223</sup>

From this heated discussion the committee of the whole moved immediately to one of the most controversial articles produced by the Commission—Article 53 on treaties conflicting with a peremptory norm of international law or, as it is customarily described, the *Jus Cogens* Doctrine. The Commission's proposal was:

A treaty is void if it conflicts with a peremptory norm of general international law from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.<sup>224</sup>

Although the principle that there are fundamental requirements of international behavior that cannot be set aside by treaty is considered a fairly recent development, it has been incorporated into Section 116 of the *Restatement of the Foreign Relations Law of the United States* in the following terms:

An international agreement may be made with respect to any matter except to the extent that the agreement conflicts with

a) the rules of international law incorporating basic standards of international conduct. . . .<sup>225</sup>

Both the Commission's article and the *Restatement*, however, present the same difficulty: they leave open the question what is a peremptory norm of international law or what is a basic standard of international conduct.

The Commission did not attempt to define a peremptory norm or to provide even an illustrative list of the norms that it considered peremptory. In the commentary to this article, the Commission noted: "The formulation of the article is not free from difficulty, since there is no simple criterion by which to identify a general rule of international law as having the character of *jus cogens*."<sup>226</sup> The Commission explained the formulation of the article as follows:

The emergence of rules having the character of *jus cogens* is comparatively recent, while international law is in process of rapid development. The Commission considered the right course to be to provide in general terms that a treaty is void if it conflicts with a rule of *jus cogens* and to leave the full content of this rule to be worked out in State practice and in the jurisprudence of international tribunals. . . .<sup>227</sup>

<sup>222</sup> *Ibid.* at 328-329.

<sup>224</sup> I.L.C. Report, note 20 above, at 77.

<sup>226</sup> I.L.C. Report, note 20 above, at 76.

<sup>223</sup> U.N. Doc. A/CONF.39/26.

<sup>225</sup> *Restatement*, note 39 above, § 116.

<sup>227</sup> *Ibid.*

In his second report Waldock had proposed three categories of *jus cogens*: (a) the use or threat of force in contravention of the principles of the United Nations Charter; (b) international crimes so characterized by international law; (c) acts or omissions whose suppression is required by international law.<sup>228</sup> The discussion in the Commission indicated such varying viewpoints on what constituted *jus cogens*<sup>229</sup> that the categories were dropped. A comment regarding the resulting draft is pertinent: "Mr. Bartoš explained that the drafting committee had been compelled to refrain from giving any definition of *jus cogens* whatever, because two-thirds of the Commission had been opposed to each formula proposed."<sup>230</sup>

The position in the conference reflected the position in the Commission. There was no substantial attack made upon the concept of *jus cogens*. Indeed, it would be very difficult to make a sustainable case that two states are free to make a treaty in which they agree to attack and carve up a third state or to sell some of their residents to each other as slaves.<sup>231</sup> But as Minagawa points out,<sup>232</sup> "examples such as the treaty permitting piracy or re-establishing slavery appear to concern merely 'une pure hypothèse d'école'." The real problem was how to define the test for recognizing a rule of *jus cogens*.

The United States proposed a two-part amendment.<sup>233</sup> The first part—that the article applied only to a treaty which "at the time of its conclusion" violated a peremptory norm—was intended to make clear that a rule of *jus cogens* did not void a treaty retroactively. The second part was designed to incorporate in the article a test by which to determine whether a rule of general international law was *jus cogens*—recognition "in common by the national and regional legal systems of the world" as a peremptory norm "from which no derogation is permitted." A less stringent requirement that the peremptory character of the norm "be recognized by the international community" was proposed by Finland, Greece and Spain.<sup>234</sup>

The debates, which extended through six meetings, revealed considerable opposition to the United States amendment on the ground it was too restrictive and would block the "evolution of *jus cogens*." The positions taken were, however, less doctrinaire and emotional than the positions taken regarding Article 52. A good number of the Afro-Asian states recognized that a gap existed in the Commission's text.<sup>235</sup> The Ukrainian representative waved the red shirt of colonial treaties in connection with the proposals

<sup>228</sup> Waldock, note 125 above, at 52.

<sup>229</sup> 1963 I.L.C. Yearbook (I) 73-78, U.N. Doc. A/CN.4/Ser.A/1963.

<sup>230</sup> *Ibid.* at 214.

<sup>231</sup> There are the attacks by Schwarzenberger (43 Texas Law Review 455; 18 Current Legal Problems 191), to which convincing rebuttals were made by, among others, Verčross (60 A. J. I. L. 55 (1966)) and Schwalb (61 A. J. I. L. 946 (1967)).

<sup>232</sup> Minagawa, "Jus Cogens in Public International Law," 6 Hitotsubashi Journal of Law and Politics 16, at 17 (1968).

<sup>233</sup> U.N. Doc. A/CONF.39/C.1/L.302 (1968).

<sup>234</sup> U.N. Doc. A/CONF.39/C.1/L.306 (1968).

<sup>235</sup> See, e.g., Official Records, First Session 314 (Ethiopia), 319 (Ceylon), 322 (Zambia), 325-326 (Malaysia).

to clarify the article,<sup>236</sup> but this did not touch off any similar denunciations by ex-colonies. The bulk of the criticism was directed to importing the concept of internal law into the *jus cogens* principle.<sup>237</sup>

The Austrian jurist, Hanspeter Neuhold, gives in his analysis of the 1968 session a lively account of the conclusion of debate:

After five meetings had been devoted to discussing the various problems of *jus cogens*, the scene was set for the final showdown at a night meeting on 7 May which lasted almost till midnight. It was fought with all the weapons which the arsenal of the rules of procedure offered the delegates. Thus, the representative of the USA introduced a motion to defer the vote on article [53] and to refer all amendments to the Drafting Committee with a view to working out a more acceptable text. This proposal was endorsed by the United Kingdom and France. Conversely, the Ghanaian delegate, who was supported by the representatives of India and the USSR, moved to take a vote immediately, since the various delegations had made their positions sufficiently clear. Motions to adjourn the debate and to close the discussion were defeated. Other motions requesting a division of the original United States proposal caused considerable confusion. At last, a roll call was taken on the motion submitted by the USA to defer voting on article [53] and the amendments thereto, which failed to obtain the necessary majority by the narrowest margin possible: 42 votes were cast in favour, the same number against, with 7 abstentions! Ironically enough, if a request by Ghana for priority of her motion to vote at once had been adopted and the votes cast in the same way, the United States motion would have prevailed indirectly . . . The first part of the substantive amendment introduced by the USA which specified the non-retroactive character of article [53]—which had been stressed by the ILC in its commentary—was adopted, whereas reference to recognition of *jus cogens* by the national and regional legal systems of the world was rejected. The somewhat similar amendment co-sponsored by Finland, Greece and Spain requesting [*sic*] recognition by the international community of a peremptory norm was, on the contrary, referred to the Drafting Committee. . . .<sup>238</sup>

A dispute then arose as to the meaning of that vote and whether the principle of *jus cogens* had been adopted. The chairman settled the matter by ruling that the *jus cogens* principle had been adopted and that the drafting committee was to see if the text could be made clearer.<sup>239</sup> In the drafting committee, Dean Sweeney performed superbly in helping frame, against substantial opposition, an addition to Article 53 that achieved the objective of the United States. A peremptory norm was defined as "a norm accepted and recognized by the international community of States as a whole. . . ." <sup>240</sup> At the eightieth meeting, the chairman of the drafting committee, in introducing the revised text, stated that the phrase "as a whole" had been included to avoid any implication that an individual state had a right of

<sup>236</sup> *Ibid.* 322.

<sup>237</sup> See, e.g., Official Records, First Session 323 (Philippines), 298 (Nigeria).

<sup>238</sup> Neuhold, "The 1968 Session of the United Nations Conference on the Law of Treaties," 19 Österreichische Zeitschrift für öffentliches Recht 59, at 86 (1969).

<sup>239</sup> Official Records, First Session 334.

<sup>240</sup> *Ibid.* at 471.

veto. The Ghanaian delegate, on the basis that the phrase might be interpreted otherwise, asked for a separate vote on those three words. The phrase was approved 57 votes to 3 with 27 abstentions.<sup>241</sup> No change was made in 1969.

Article 64 is a corollary of Article 53 which provides that if a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates. There was little discussion of this article at the conference because it is so clearly implicit in the principle of *jus cogens*. The necessity for it as a separate article springs from the fact that different legal consequences attend a treaty that is entered into in violation of an existing rule of *jus cogens* (which is considered as void *ab initio*) and the annulment of an existing treaty by the emergence of a new rule. The differing effects are spelled out in Article 71. In a case falling under Article 53 the parties must:

- (a) eliminate as far as possible the consequences of any act performed in reliance on any provision which conflicts with the peremptory norm of general international law; and
- (b) bring their mutual relations into conformity with the peremptory norm of general international law.<sup>242</sup>

In an Article 64 case, however, "the termination of the treaty:

- (a) releases the parties from any obligation further to perform the treaty;
- (b) does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination; provided that those rights, obligations or situations may thereafter be maintained only to the extent that their maintenance is not in itself in conflict with the new peremptory norm of general international law."<sup>243</sup>

Section 3 of Part V is entitled Termination and Suspension of the Operation of Treaties. Articles 54, 55, 57, and 58 are unexceptional, specifying that various aspects of termination and suspension must be dealt with in conformity with the treaty or with the consent of all the parties, or, if by agreement between certain of the parties, subject to the same limitations expressed in Article 41 on agreements to modify.

Paragraph 1 (b) of Article 56 permitting denunciation of or withdrawal from a treaty which includes no provision on the subject if such right "may be implied by the nature of the treaty" was added at the first session of the conference. The United States was concerned that the provision might facilitate unilateral denunciation without regard to procedures for disputes-settlement, since Article 65 did not mention denunciation. The delegation raised the problem in the drafting committee at the second session and established a clear legislative history, including statements by the chairman of the drafting committee,<sup>244</sup> the expert consultant, and the

<sup>241</sup> *Ibid.* at 472.

<sup>242</sup> Art. 71, par. 1.

<sup>243</sup> Art. 71, par. 2.

<sup>244</sup> U.N. Doc. A/CONF.39/SR. 25, at 2 (1969).



sponsor of the amendment that the procedure of Section 4 of Part V applied to notices of denunciation grounded upon Article 56.

Article 59 restates two long-established rules for deciding whether the termination or suspension of a treaty is effected by a later treaty—the intent of the parties and the compatibility of the two treaties.

The International Law Commission proposed the following article on breach:

*Termination or suspension of the operation of a treaty as a consequence of its breach*

1. A material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part.

2. A material breach of a multilateral treaty by one of the parties entitles:

(a) The other parties by unanimous agreement to suspend the operation of the treaty or to terminate it either:

(i) in the relations between themselves and the defaulting State, or  
(ii) as between all the parties;

(b) A party specially affected by the breach to invoke it as a ground for suspending the operation of the treaty in whole or in part in the relations between itself and the defaulting State;

(c) Any other party to suspend the operation of the treaty with respect to itself if the treaty is of such a character that a material breach of its provisions by one party radically changes the position of every party with respect to the further performance of its obligations under the treaty.

3. A material breach of a treaty, for the purposes of the present article, consists in:

(a) A repudiation of the treaty not sanctioned by the present articles; or

(b) The violation of a provision essential to the accomplishment of the object or purpose of the treaty.

4. The foregoing paragraphs are without prejudice to any provision in the treaty applicable in the event of a breach.<sup>245</sup>

The point made in the Commission's commentary that "the great majority of jurists recognize that a violation of a treaty by one party may give rise to a right in the other party to abrogate the treaty or to suspend the performance of its own obligations under the treaty"<sup>246</sup> was borne out in the discussions at Vienna. No delegation denied the principle,<sup>247</sup> although several expressed the view that a less strict approach to the article was required. The conference rejected all initiatives to weaken the rather conservative formulation adopted by the Commission.

<sup>245</sup> I.L.C. Report, note 20 above, at 82.      <sup>246</sup> *Ibid.*

<sup>247</sup> The commentary to the corresponding article in the Harvard Draft summarizes the traditional international law doctrine regarding breach and demonstrates that the principle has been recognized in United States courts since late in the eighteenth century. 29 A. J. I. L. Supp. 653, 1078 (1935), Comment on Art. 27. For a recent treatment of the subject, see Bhikaji Sinha, *Unilateral Denunciation of Treaty Because of Prior Violations of Obligations by Other Party* (1966).

In the debate on the article the U.S. representative noted that the text and commentary served the cause of the stability of treaty relations by providing that a material breach could be invoked by a party to terminate a treaty or suspend its operation but did not produce that effect in itself. However, the article did not clearly indicate when a party invoking breach could suspend the operation of the treaty in whole and when in part. He thought it would be helpful to introduce into the article itself an element of proportionality.<sup>248</sup> Accordingly, he proposed adding at the end of paragraph one the following language: "as may be appropriate considering the nature and extent of the breach and the extent to which the treaty obligations have been performed."<sup>249</sup> He also suggested a similar formulation be added at the end of subparagraph (b) of paragraph 2.<sup>250</sup>

The tenor of the debate in the committee of the whole made it clear that no amendment would be possible in the article in 1968. In light of this attitude the United States Delegation responded positively to the United Kingdom suggestion that the delegation withdraw its amendments to the breach article on the understanding that the principle of proportionality embodied therein would be considered in connection with the separability article, on which a vote had not then been taken. In the separability context, although attracting substantial support, the principle failed to obtain a majority when put to the vote. This left before the house amendments by Finland, Spain and Venezuela. The Finnish amendment might have clarified the text, but adoption of either the Spanish or Venezuelan amendment would have militated against the stability of treaties. At the conclusion of the debate the committee decisively rejected all three.

An amendment to subparagraphs 2(a) and (c) was introduced by the United Kingdom at the 1969 session and, in most respects, adopted by the plenary. The article as amended permits separability in cases in which it entitles one or more parties to a multilateral treaty to suspend or to invoke the material breach as a ground for suspending the operation of the treaty. The Conference also adopted a Swiss proposal which appears as paragraph 5 of Article 60:

5. Paragraphs 1 to 3 do not apply to provisions relating to the protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals against persons protected by such treaties.

With regard to most treaties, the rules in paragraphs 1 and 2 of the amended article should suffice to insure that a state will not suffer from unjustified repudiation by another party of its treaty obligations. The Commission recognized, however, that some treaties may include special provisions on breach. In such cases, Article 60 would not preclude the parties from applying those special provisions. Paragraph 4, which reserves

<sup>248</sup> Official Records, First Session 354.

<sup>249</sup> U.N. Doc. A/CONF.39/C.1/L.325 (1968).

<sup>250</sup> *Ibid.* Cf. Restatement, note 39 above, § 158 (1) (c), (1965).

the rights of the parties in such cases, parallels language in §158 (1) of the *Restatement*.<sup>251</sup>

In formulating its article on *Supervening impossibility of performance* the International Law Commission was principally concerned with laying down a rule to govern termination or suspension in cases such as "the submergence of an island, the drying up of a river or the destruction of a dam or hydro-electric installation indispensable for the execution of a treaty."<sup>252</sup> The Commission decided not to include in the article a provision that a party cannot take advantage of a supervening impossibility resulting from its own wrongful act.<sup>253</sup> The conference adopted the substance of the Commission's text but reversed its decision as to the additional provision. The Commission's rule is incorporated in paragraph 1 of Article 61; the well-founded exception, in paragraph 2:

1. A party may invoke the impossibility of performing a treaty as a ground for terminating or withdrawing from it if the impossibility results from the permanent disappearance or destruction of an object indispensable for the execution of the treaty. If the impossibility is temporary, it may be invoked only as a ground for suspending the operation of the treaty.

2. Impossibility of performance may not be invoked by a party as a ground for terminating, withdrawing from or suspending the operation of a treaty if the impossibility is the result of a breach by that party either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty.

In the debate on paragraph 1, Professor Briggs stated that while the United States did not propose to submit a formal amendment, he wished to draw the attention of the committee to a possible inconsistency in the draft: "Although the first sentence referred to an impossibility of performance resulting from permanent disappearance or destruction, the second sentence appeared to imply that the so-called permanent disappearance or destruction might be only temporary."<sup>254</sup> He suggested eliminating that implication by making it clear that if the object could be replaced suspension rather than termination was the only course of action permissible under that article.

The drafting committee did not adopt the drafting change suggested by Professor Briggs, but it did in large measure resolve the problem. In recommending the text of the article to the committee of the whole the chairman stated that "the drafting committee wished to emphasize that the destruction or disappearance of an object of a treaty did not constitute a permanent impossibility of performance if the object could be replaced."<sup>255</sup>

<sup>251</sup> *Ibid.*, note 39 above.

<sup>252</sup> I.L.C. Report, note 20 above, at 84 (1966).

<sup>253</sup> 1966 I.L.C. Yearbook (I, Pt. I) 129-130, U.N. Doc. A/CN.4/Ser.A/1966; cf. *ibid.* 67-75.

<sup>254</sup> Official Records, First Session 362-363.

<sup>255</sup> *Ibid.* at 479.

In introducing the text of paragraph 2, the Netherlands Delegation explained it was "derived from the general principle of law that a party could not take advantage of its own wrong. Article [62] expressly stated that exception, and there was no reason to proceed differently in article [61]. . . ." <sup>256</sup> The debate on the amendment followed a pattern surprisingly different from that on most of the invalidity articles. Although not all delegations endorsed the Netherlands amendment—France, Poland, and Trinidad and Tobago were mildly opposed and Bulgaria characterized it as introducing "a purely subjective factor" <sup>257</sup>—representatives of the Democratic Republic of the Congo, Malaysia, Singapore, the United States and the U.S.S.R. supported the proposal. No delegate urged that the committee uphold the Commission's decision. When put to the vote, the amendment was adopted by a 3-to-1 margin. <sup>258</sup>

Article 62 incorporates a carefully phrased version of the doctrine of *rebus sic stantibus*. The principles expressed in Article 62 may be regarded as largely reflecting existing international law rather than as formulating a new norm. As the commentary states: "Almost all modern jurists, however reluctantly, recognize the existence in international law of the principle with which this article is concerned and which is commonly spoken of as the doctrine of *rebus sic stantibus*." <sup>259</sup> In United States practice the major precedent is the suspension of the International Load Line Convention in 1941. <sup>260</sup>

Professor Lissitzyn has reviewed relevant state practice which either escaped the attention of prior scholars or occurred too late to be incorporated in earlier studies. <sup>261</sup> Lissitzyn points out that parties did not regard their obligations as terminable at will when circumstances had changed; they generally claimed the right to suspend performance. In none of the cases cited is there any indication that the suspending state contemplated review of its claim by an international tribunal in order that suspension of its obligations might be "justified definitively," as the Harvard Draft would have required.

<sup>256</sup> *Ibid.* at 362.

<sup>257</sup> *Ibid.* at 363.

<sup>258</sup> *Ibid.* at 365.

<sup>259</sup> I.L.C. Report, note 20 above, at 85 (1966). Cf. Art. 28 of the Harvard Draft which provided that a state might be relieved from further performance under "a treaty entered into with reference to the existence of a state of facts the continued existence of which was envisaged by the parties as a determining factor moving them to undertake the obligations stipulated . . . when that state of facts has been essentially changed." 29 A. J. I. L. Supp. 662-663 (1935).

<sup>260</sup> In his opinion supporting the suspension the Acting Attorney General stated:

" . . . the implicit assumption of normal peacetime international trade, which is at the foundation of the Load Line Convention, no longer exists.

"Under these circumstances there is no doubt in my mind that the convention has ceased to be binding upon the United States. It is a well-established principle of international law, *rebus sic stantibus*, that a treaty ceases to be binding when the basic conditions upon which it was founded have essentially changed. . . ." 40 Op. Att'y Gen. 119, 121 (1941).

<sup>261</sup> "Treaties and Changed Circumstances (*Rebus Sic Stantibus*)," 61 A. J. I. L. 895, 902-911 (1967).

The International Law Commission proposed the following text:

1. A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless:

- (a) The existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and
- (b) The effect of the change is radically to transform the scope of obligations still to be performed under the treaty.

2. A fundamental change of circumstances may not be invoked:

- (a) As a ground for terminating or withdrawing from a treaty establishing a boundary;
- (b) If the fundamental change is the result of a breach by the party invoking it either of the treaty or of a different international obligation owed to the other parties to the treaty.<sup>262</sup>

An important feature of the Commission's text (which had not been incorporated in Article 28 of the Harvard Draft) was subparagraph 2 (a) which precluded invocation of the article as a ground for terminating or withdrawing from a treaty establishing a boundary. The United States, which supported this substantial improvement in the formulation of the principle, proposed that subparagraph 2 (a) be broadened to read as follows: "(a) As a ground for terminating or withdrawing from a treaty drawing a boundary or otherwise establishing territorial status."<sup>263</sup> The purpose of the U.S. amendment was to extend the subparagraph to cover "several important groups of treaties, which, while not establishing boundaries, established territorial status or settled territorial disputes."<sup>264</sup> Although there was some support for the U.S. amendment, the committee of the whole rejected the proposal.

In the course of the debate on this article representatives from several African and Latin American states called for deletion of subparagraph 2 (a). Mr. Tabibi (Afghanistan), for example, argued:

... The exceptions stated in paragraph 2 greatly weakened the doctrine by excepting boundary treaties from the general rule, in the name of the stability of treaties but to the detriment of the interests of nations and individuals. He agreed with the Swiss representative that certain treaties establishing a legal régime should not be capable of being voided, but it was wrong to claim that boundary treaties and treaties establishing territorial status, of which the United States representative had spoken, should be excepted from the application of the rule. . . . [Paragraph 2 (a) was] incompatible with the principle of peaceful relations among States, since undue rigidity was a source of disputes. A boundary line was not a geometric line, but determined the fate of millions of human beings. . . . A treaty imposed during the colonial era for colonial or military reasons should not be exempted from the rule. Paragraph 2 (a) should therefore be deleted.<sup>265</sup>

<sup>262</sup> I.L.C. Report, note 20 above, at 18.

<sup>263</sup> A/CONF. 39/C.1/L.335 (1968).

<sup>264</sup> Official Records, First Session 367.

<sup>265</sup> *Ibid.*, at 373.

On the other hand, a number of African states took the floor to endorse the Commission's text. Typical of these remarks were those of Mr. Mutuale of the Democratic Republic of the Congo:

... his delegation approved of the principle expressed in [the] article. . . . As formulated by the International Law Commission, that principle was based on justice and equity. It was also a useful principle which helped to promote the stability of treaty relations, prevented their violent rupture and provided a remedy for the desperate plight of a State which found itself unable to meet burdensome obligations because the circumstances which had induced it to accept those obligations had ceased to exist, without such an eventuality having been contemplated in the treaty. The principle should however be watered down because its application by States entailed certain risks; it should therefore be made subject to conditions such as the International Law Commission had very wisely provided.<sup>266</sup>

Similar views were expressed by other Africans, by India and Pakistan, by the U.S.S.R. and the Eastern European countries, and, subject to adoption of a satisfactory procedure for settlement of disputes, by a number of Western Europeans. By the end of the discussion it was clear that partisans of the Tabibi view had been severely isolated; they did not press their proposal for deletion of paragraph 2 (a) to the vote.

During the debate on the article the Canadian representative referred to Professor Lissitzyn's suggestion in this JOURNAL that in some cases of changed circumstances suspension rather than termination of the treaty obligation might be appropriate,<sup>267</sup> and proposed an amendment to this effect. A similar proposal was made by Finland. By a vote of 31 for, 26 against, with 28 abstentions, the principle of the amendment was adopted.<sup>268</sup>

A comparison of the International Law Commission's draft article and the text of Article 62 shows very little difference except for the addition of a new paragraph 3 on suspension, which is derived from the Canadian and Finnish amendments, and the replacement in paragraph 1 (b) of the word "scope," which Professor Lissitzyn had characterized as "puzzling,"<sup>269</sup> by "extent."

Given the delicacy of the article and the doctrinal dispute as to whether or not the principle represented an implied term in treaties—a matter which received little attention in the debates—its adoption nearly unchanged in the form proposed is a tribute to the skill with which the International Law Commission had balanced a rule which afforded "a safety-valve in the law of treaties"<sup>270</sup> yet provided protection of the security of treaties by "adequate safeguards . . . against its arbitrary application."<sup>271</sup>

<sup>266</sup> *Ibid.* at 377.

<sup>267</sup> 61 A. J. I. L. 916 (1967).

<sup>268</sup> Official Records, First Session 382.

<sup>269</sup> 61 A. J. I. L. 917 (1967).

<sup>270</sup> I.L.C. Report, note 20 above, at 56 (par. 6 of commentary).

<sup>271</sup> *Ibid.* (par. 5 of commentary).

## SETTLEMENT OF DISPUTES

During the debates on the articles on invalidity, suspension and termination, one of the major concerns expressed was the absence in the Commission's draft of any adequate provisions for dealing with an assertion of the invalidity of a treaty or a claim of a right to unilateral termination or suspension. In the explanations of vote that followed adoption of Article 53 on *jus cogens*, for example, Belgium, Canada, Chile, the Federal Republic of Germany, France, Italy, Portugal, Sweden, the United Kingdom and the United States stated that their final positions regarding the article depended upon adoption of a system for impartial settlement of disputes.<sup>272</sup>

The Commission had proposed a procedure for dealing with claims of a state to be released from a treaty obligation under one of the grounds contained in Part V. The state would be required to notify the other parties to the treaty of its claim, of the grounds therefor and of the action to be taken regarding the treaty. If no objection to the proposed action were made within three months, it could then be carried out. If objection were made, then a solution was to be sought through the means indicated in Article 33 of the United Nations Charter.<sup>273</sup>

Article 33 of the Charter merely lays down a catchall rule that disputes should be settled by peaceful means of the parties' own choice. The Commission's procedure left undecided the crucial issue whether a party claiming, for example, the right to withdraw from a treaty could go ahead and withdraw if either it did not agree with the other parties on a peaceful means for settling the dispute or if the peaceful means selected failed to result in a settlement.

This elemental gap in the draft articles had been the subject of considerable adverse comment prior to the conference. In the debate on the Commission's draft articles in the Sixth Committee of the General Assembly in 1967, the United States representative observed that a major weakness of the draft articles was that they

pointed out a good many ways to begin arguments over the validity . . . of a treaty. But they do not contain any sure methods of settling such arguments. . . . The [procedural] safeguard proposed did not afford real protection. . . .

Failure to provide for ready recourse to some mandatory means for the impartial settlement of disputes would mean a Convention on the Law of Treaties which would be incomplete, one-sided, and susceptible to misuse.<sup>274</sup>

Improvement of the flawed provisions of the draft article for the settlement of disputes over the continuance in force of a treaty became the major issue of the conference. The states fighting for the stability of the treaty structure were agreed that unless some form of impartial disputes-settlement procedure was incorporated into the Convention on the Law of

<sup>272</sup> Official Records, First Session 472-473.

<sup>273</sup> I.L.C. Report, note 20 above, at 89.

<sup>274</sup> 59 Department of State Bulletin 721-722 (1967).

Treaties, the possibility of abuse through claims of unilateral termination on specious or non-existent grounds could negate the great contribution that the convention over-all offered for the development of international law.

The obstacles to incorporation of an adequate disputes-settlement procedure were formidable. Precedent was against the attempt. In previous codification conferences,<sup>275</sup> efforts to include provisions for the settlement of disputes by establishing mandatory jurisdiction in the International Court of Justice had been defeated. The defeats were engineered in each case by procedural maneuvers which resulted in substituting optional protocols that provided for I.C.J. jurisdiction on application of a party to a dispute arising out of the convention concerned. There was, however, no requirement that a party to the convention had also to be a party to the protocol. The inadequacy of the protocols as a substitute for compulsory requirements in the conventions themselves is demonstrated by the fact that in no case have as many as half of the parties to a convention ratified the relevant protocol.<sup>276</sup>

A second obstacle was the fervid and long-standing opposition of the Soviet Union and its associates to any form of impartial decision-making for the settlement of international disputes.<sup>277</sup> This opposition stems in large measure from the basic tenet of the Marxist-Leninist ideology that courts exist to further state policies and not to judge them. To have a tribunal outside the system scrutinizing state action doubled the unacceptability. The Communist bloc was reinforced by a heterogeneous group of states whose opposition to mandatory disputes-settlement derived from a variety of reasons. The Arab states were almost solidly opposed, as were India, Indonesia, Kenya, and Tanzania, to give a few prominent examples. All of the states mentioned and the Communist bloc made strenuous efforts in the first session of the conference to block any improvement in the draft article. As their relations and influence with other Asian and African states were extensive, these active opponents were able

<sup>275</sup> Those on the Law of the Sea, on Diplomatic Relations, and on Consular Relations.

<sup>276</sup> *E.g.*, as of Jan. 1, 1970, there were 91 parties to the Diplomatic Relations Convention and 38 to the Consular Relations Convention. The Optional Protocols to those Conventions concerning the Compulsory Settlement of Disputes had, respectively, 38 and 15 parties.

<sup>277</sup> "The Soviet Union has neither accepted the 'Optional Clause' of the Statute of the International Court of Justice nor (generally) the articles of multilateral conventions providing for compulsory jurisdiction of the Court with respect to disputes arising under those conventions. A Soviet commentator on the Law of the Sea Conference held in 1958 has discussed the provisions for settlement of disputes under the fisheries convention in the following terms: 'The provisions of the Convention on the settlement of disputes between states on the question of fishing are unsatisfactory as they establish a procedure under which disputes may be decided on the request of any one of the interested parties in a special arbitration commission composed of five members. Such a procedure is compulsory arbitration and is a serious departure from the principle of the sovereign equality of states. Naturally, the delegation of the Soviet Union and many other delegations took a position vigorously against compulsory arbitration. . . .'" Larson, Jenks and others, *Sovereignty Within the Law* 291 (1965), citing Molodstov, *Codification and Further Development of the International Law of the Sea*.



to persuade a large number of delegations to oppose the compulsory settlement of disputes.

A third major obstacle was the 1966 decision of the International Court of Justice in the Second Phase of the *South West Africa Cases (Liberia and Ethiopia v. South Africa)*.<sup>273</sup> Almost every African state, like many others around the world, deeply resented the holding that the Court was unable to decide whether South African imposition of *apartheid* in South West Africa violated the terms of the League of Nations Mandate, under which South Africa administered the territory. The conclusion that former Member States of the League, including the plaintiffs Liberia and Ethiopia, had no legal right or interest in the matter intensified antagonism to the Court because of the legitimate expectations based on the 1962 decision on Preliminary Objections<sup>270</sup> which logically entailed the conclusion that the Court possessed the authority to determine whether or not South Africa had lived up to its mandate responsibilities. The effect of the decision especially among the newly-independent African states was to undermine confidence in the Court as an impartial dispute-settling mechanism. The adamant opposition of these states to seeking an advisory opinion from the Court on the question whether *apartheid* violates the Mandate before voting through the resolution terminating the Mandate<sup>280</sup> underscores this alienation.

The World Court was the logical choice for determining such issues as the existence of a rule of *jus cogens* or whether a state was induced to conclude a treaty by fraud. The United States comments in 1965 on the subject stated that "the rule of law . . . argues most strongly for compulsory reference to the Court."<sup>281</sup> But it was quite clear that the intervening South West Africa decision reduced to near zero the chance of obtaining an eventual two-thirds majority for judicial settlement by the Court of disputes arising out of Part V.

The fourth major obstacle to attaining an effective disputes-settlement procedure was disarray among the states that favored incorporation of such provisions. Some states, such as Japan, Switzerland and Turkey, considered adjudication by the International Court the *sine qua non* for acceptance of Part V and determined to push for the Court despite the prohibitive odds. Others, such as Sweden, Tunisia and Peru, were prepared to accept arbitration in a variety of forms. Still others supported a compulsory conciliation process with major emphasis on fact-finding.

Given the general fluidity of the situation, the United States Delegation at the 1968 session of the conference concentrated in the conference hall and in the corridors of the Hofburg on convincing as many delegates as possible that an optional protocol approach should be rejected and, without specifying any particular mode of settlement, that there must be an effective disputes-settlement procedure for Part V.

<sup>273</sup> [1966] I.C.J. Rep. 6.

<sup>270</sup> [1962] I.C.J. Rep. 319.

<sup>280</sup> General Assembly Res. 2145, General Assembly, 21st Sess., Official Records, Supp. 16 at 2, U.N. Doc. A/6316 (1966).

<sup>281</sup> I.L.C. Report, note 20 above, at 180 (1965 comment on Art. 51).

As the committee of the whole, under the able chairmanship of Attorney General Elias of Nigeria, worked its way through the first sixty articles, support began to coalesce around a Dutch-Swedish draft on disputes-settlement. A two-step procedure was suggested, requiring first a somewhat institutionalized form of conciliation, and, if that failed, then access to a simple system of arbitration. This proposal was merged with one supported by a number of the francophone African states, which resulted in a less formal series of conciliation provisions.<sup>282</sup> The revised amendment was co-sponsored by the Central African Republic, Colombia, Dahomey, Denmark, Finland, Gabon, Ivory Coast, Lebanon, Madagascar, The Netherlands, Peru, Sweden and Tunisia. As the debate proceeded it became clear that, of the proposals for disputes-settlement, the thirteen-state amendment would receive the widest support.<sup>283</sup>

The United States also put in a proposed amendment to develop a number of technical points not covered in the thirteen-state amendment. The main elements of the United States proposal included establishment of a commission on treaty disputes charged with effecting settlement through conciliation and empowered to order provisional measures to preserve the rights of parties, a special rule governing performance in breach cases, and reference of disputes not resolved through conciliation to arbitration at the request of any disputant unless the parties agreed to submit the dispute to the International Court of Justice.<sup>284</sup>

A Swiss proposal<sup>285</sup> was simple but unacceptable to the bulk of the African and Asian states. A key provision was an irrebuttable presumption of abandonment of a claim of invalidity unless the invoking party promptly brought the matter before the International Court of Justice or an arbitral tribunal.

A Japanese proposal<sup>286</sup> had two elements. Disputes concerning *jus cogens* (i.e., those in which a party claimed a treaty was void because it violated a peremptory norm of international law) would be decided by the Court on the application of either party. Other claims that a treaty no longer applied would ultimately be referred to arbitration unless the parties agreed to go to the Court. The first part of the Japanese proposal elicited scattered support.

Finally, a Uruguayan amendment<sup>287</sup> sought to establish the applicability of the United Nations Charter provisions for disputes-settlement so that treaty disputes might be considered by the Security Council.

In the eight meetings at which the committee of the whole discussed the article in 1968, no clear trend emerged. The U.S.S.R. and the Eastern Europeans opposed all proposals to improve procedures for settlement of disputes. Influential African and Asian delegations joined in this oppo-

<sup>282</sup> U.N. Doc. A/CONF.39/C.1/L.352/Rev.1 and Corr.1 (English only) (1968).

<sup>283</sup> Official Records, First Session 402-441 *passim*.

<sup>284</sup> U.N. Doc. A/CONF.39/C.1/L.355 (1968).

<sup>285</sup> U.N. Doc. A/CONF.39/C.1/L.347 (1968).

<sup>286</sup> U.N. Doc. A/CONF.39/C.1/L.339 (1968).

<sup>287</sup> U.N. Doc. A/CONF.39/C.1/L.343 (1968).

sition. On the other hand, a majority of the Latin American group, most Western Europeans, members of the Old Commonwealth, and some African and Asian states favored improvement. Of the 53 delegations that spoke in the committee, 30 favored improvement, 22 were opposed, and 1 was undecided.<sup>288</sup> Neither side knew accurately how the 50 silent states would vote. The United States Delegation estimated that there was a majority against disputes-settlement. Opponents of improved procedures, such as the Ukrainian Soviet Socialist Republic Delegation, seemed to believe that they would be able to defeat any disputes-settlement proposal.<sup>289</sup> On May 16 debate was adjourned to permit the holding of "informal consultations."<sup>290</sup>

One aspect of the consultations was that disputes-settlement had, as a result of Soviet maneuvering, become entangled with the "all-states" issue. The "all-states" proposals related to two matters. The substantive issue involved the right to participate in multilateral treaties. The International Law Commission's articles reflected the traditional rule that states are free to choose their treaty partners. As the conference progressed, the Communist bloc supplemented its proposal set out at footnote 60 above by a series of related amendments similarly designed to achieve recognition for entities such as the German Democratic Republic by permitting them to become parties to general multilateral treaties. Dealing with this problem was complicated when France introduced a series of amendments<sup>291</sup> to establish special rules for restricted multilateral treaties. The Commission had found it impossible to define either of these concepts.<sup>292</sup>

There was no logical relationship between the disputes-settlement issue and the "all-states" proposals, but a nexus was established largely through the co-operation of three or four influential Asian and African delegates who pushed the position among their colleagues that nothing should be done regarding disputes-settlement unless something was done for the Soviet Union on "all-states." However, nose counts had established that if the "all-states" amendments were put to a vote, they would be defeated and that the thirteen-state disputes-settlement proposal was likely to be defeated. As a result of the general uncertainty, both sets of proposals as well as the French amendments on restricted multilateral treaties were put over until the 1969 session.<sup>293</sup>

Following the close of the first session of the conference the United States sought to rally support for inclusion of a settlement-of-disputes provision at the second session. It chose the thirteen-state proposal as the most likely basis for an agreed amendment. It initiated approaches in a number of capitals for support. In addition, certain United States embassies undertook to encourage countries that had not participated in the

<sup>288</sup> Official Records, First Session 402-415, 418-425, 429-441.

<sup>289</sup> Official Records, First Session 411. <sup>290</sup> *Id.* 441.

<sup>291</sup> To Arts. 9, 20, 30, 40, 41, 58, 69, and 70.

<sup>292</sup> I.L.C. Report, note 20 above, at 22-23, par. 8 of commentary (1966); *ibid.* at 38, par. 14 of commentary.

<sup>293</sup> Official Records, First Session 474, 476.

first session but which seemed likely to support an effective procedure for settlement of disputes to attend the second session. Yeoman service was also rendered by Professor McDougal, who attended the meeting of the Asian-African Legal Consultative Committee in Karachi in January, 1969, as an observer for the American Society of International Law.

When the committee of the whole resumed its labors in Vienna on April 9, 1969, the principal items of business were the two postponed problems. The disputes-settlement issue was taken up first. One result of intersessional missionary work was a revision of the thirteen-state proposal to embody a number of the features of the U.S. amendment. The revision<sup>294</sup> acquired six additional co-sponsors: Austria, Bolivia, Costa Rica, Malta, Mauritius and Uganda. After eight sessions of debate, it had become clear that there was a majority in favor of the amendment. On April 22, following the rejection of a motion by Ghana to adjourn the debate for forty-eight hours, sought by opponents in an effort to regroup their forces, various amendments were put to the vote. The Swiss and Japanese amendments were defeated but the nineteen-state proposal was adopted by 54 votes in favor, 34 against, with 14 abstentions.<sup>295</sup> A last-ditch move by India, Indonesia, Tanzania and Yugoslavia to convert the amendment into a kind of optional protocol was turned back 47 to 37, with 19 abstentions.<sup>296</sup>

Immediately thereafter a totally new proposal was taken up. There had been a good deal of off-the-record concern expressed during the 1968 session regarding amendments whose major purpose seemed to be improvement of the position of one or another party to a treaty dispute. Practically all such proposals had been voted down, but these efforts had forced many delegates to appreciate that existing treaties could be adversely affected by the application of principles that were not clear or not recognized at the time those treaties were concluded.

The Commission's proposal on non-retroactivity of treaties had been adopted by the committee of the whole without change. It provided that a treaty did not bind a party with respect to a fact or act which had taken place or a situation which had ceased to exist prior to the date of the treaty's entry into force for that party.<sup>297</sup> Its precise effect upon the relationships between existing treaties and the far-ranging effects of the proposed convention would have been difficult to calculate.

As the second session moved on, a growing sentiment was apparent for making the application of the convention strictly prospective. A number of amendments were floated in the corridors and several introduced. Support solidified behind a proposal co-sponsored by Brazil, Chile, Kenya, Iran, Sweden, Tunisia and Venezuela:

Without prejudice to the application of any rules set forth in the present Convention to which treaties would be subject, in accordance

<sup>294</sup> U.N. Doc. A/CONF.39/C.1/L.352/Rev. 3 and Add. 1 and 2 and Corr. 1 (English only) (1969).

<sup>295</sup> U.N. Doc. A/CONF.39/C.1/SR.99 at 8 (1969).

<sup>296</sup> *Ibid.* at 7.

<sup>297</sup> Art. 28 of the convention.

with international law, independently of the Convention, the Convention will apply only to treaties which are concluded by States after the entry into force of the present Convention with regard to such States.<sup>298</sup>

This amendment was discussed in connection with consideration of the final clauses on April 23 and 24. There was general support for the proposal, and it was adopted by 71 votes to 5, with 29 abstentions.<sup>299</sup>

The "all-states" issue had been again debated at the opening of the committee proceedings. The French had withdrawn their amendments on restricted multilateral treaties, and this sharpened the focus of the discussions. Voting, however, was postponed until April 25. On that date all outstanding amendments relating to the "all-states" question were defeated by substantial majorities.<sup>300</sup>

The committee of the whole having completed its labors, the battleground shifted to the plenary. As the nineteen-state proposal on disputes-settlement had not attained the support of two thirds of the conference in the committee of the whole, strenuous efforts were made to improve the voting position in the plenary. Eight additional votes were secured, bringing the total of affirmative votes up to 62. However, the opponents of compulsory settlement were able to net 3 additional negative votes which prevented the adoption of the proposal.<sup>301</sup>

In view of the unequivocal statements by a substantial number of states that they would not become parties to a convention on the law of treaties that did not contain adequate procedures for the settlement of disputes arising under the invalidity articles, it appeared that the conference would fail. In an almost continuous series of meetings the leaders of the conference endeavored to find a solution to the impasse. On a number of occasions it appeared that satisfactory compromise arrangements had been worked out, but they failed to gain enough support to ensure the necessary two-thirds majority.

Renewed efforts to incorporate an "all-states" substantive article in the convention were again rejected.<sup>302</sup> A second aspect of the "all-states" issue had arisen, this one involving the Final Clauses. Ghana and India had taken the initiative in sponsoring a formula for the articles on signature and accession which would have permitted unrecognized regimes in split states to become parties to the convention.<sup>303</sup> After lengthy contention in the committee of the whole this proposal was rejected.<sup>304</sup> A proposal by Brazil and the United Kingdom that embodied the traditional "Vienna formula"<sup>305</sup>

<sup>298</sup> U.N. Doc. A/CONF.39/C.1/L.403 (1969).

<sup>299</sup> U.N. Doc. A/CONF.39/C.1/SR.104, at 11 (1969).

<sup>300</sup> U.N. Docs. A/CONF.39/C.1/SR.104, at 13, 14; A/CONF.39/C.1/SR.105, at 5 (1969).

<sup>301</sup> U.N. Doc. A/CONF.39/SR.27, at 8 (1969).

<sup>302</sup> U.N. Doc. A/CONF.39/SR.34, at 8-9 (1969).

<sup>303</sup> U.N. Doc. A/CONF.39/C.1/L.394 (1969).

<sup>304</sup> U.N. Doc. A/CONF.39/C.1/SR.104, at 13-14 (1969).

<sup>305</sup> "This Convention shall be open for signature [for accession] by all States Members of the United Nations or of any of the specialized agencies or of the International Atomic Energy Agency or parties to the Statute of the International Court of Justice, and by any other State invited by the General Assembly of the United Nations to become a party to the Convention. . . ."

was adopted. These decisions were reaffirmed by the plenary. Their substance is reflected in Articles 81, 82 and 83, which deal, respectively, with signature, ratification and accession.

Although in most respects the final clauses of the convention follow those of prior codification conventions, there is a difference worth noting in the article on entry into force. The conventions of 1958 on the Law of the Sea required twenty-two instruments of ratification or accession prior to entry into force. This precedent was followed in the Vienna Conventions on Diplomatic Relations in 1961 and on Consular Relations in 1963. There was a general consensus that the number should be increased for the Treaties Convention.

The committee of the whole, faced with choosing between amendments proposing 35, 45, and 60 ratifications, left the figure blank in the final clauses it adopted and charged the plenary with resolution of the problem. In summing up the debate the expert consultant expressed the view that the figure of thirty-five "would serve the purpose of recognizing the existence of an enlarged community, would not unduly delay the bringing into force of the Convention, and would not endanger some of the benefits of the . . . work done on the Convention at the . . . Conference."<sup>306</sup> In the plenary, a seven-nation proposal containing the number thirty-five was adopted without objection.

In the closing days of the conference there were meetings going on at all hours among the leaders of the various political and geographical groups. A variety of compromises for settling the two major points of contention were floated, but none attracted sufficient support. The most popular was a proposal that coupled a declaration on the "all-states" issue with a disputes-settlement formula that provided arbitration for a few articles in Part V and conciliation for the remaining articles.

On the final full day of the second session a caucus of Asian and African delegations met to discuss the problem. A group of those delegations, led by Nigeria, succeeded in putting together a compromise proposal which included a new article entitled *Procedures for judicial settlement, arbitration and conciliation*, and a non-binding declaration on the right to accede to the convention, which in effect relegated the matter to the General Assembly. The sponsors, Ghana, Ivory Coast, Kenya, Kuwait, Lebanon, Morocco, Nigeria, Sudan, Tunisia and Tanzania, declined to permit division of their proposal and insisted that it be put to the vote without delay. By a vote of 61 for, 20 against, with 26 abstentions, the proposal carried.<sup>307</sup>

<sup>306</sup> U.N. Doc. A/CONF.39/C.1/SR.103, at 27 (1969). Forty-seven countries, including the United States, had signed the convention as of April 30, 1970, the closing date for signature specified in Art. 81. One country, Nigeria, had ratified the convention. The convention remains open for accession by any state belonging to any of the categories mentioned in footnote 305. No "undue delay" in entry into force of the convention is anticipated.

<sup>307</sup> U.N. Doc. A/CONF.39/SR.34, at 27 (1969).

The new article, Article 66, combines elements of the Japanese and nineteen-Power amendments. It authorizes any party to a dispute arising under the *jus cogens* articles to submit the dispute to the International Court of Justice for adjudication whenever the procedures in Article 33 of the Charter have not led to the solution of the dispute within twelve months and unless the parties have agreed instead to submit it to arbitration. A party to a dispute concerning "the application or the interpretation of any of the other articles in Part V"<sup>308</sup> can initiate the conciliation procedures provided in the annex to the convention by submitting a request to the Secretary General of the United Nations.

The annex envisages the establishment of a list of qualified jurists to serve as conciliators. When the Secretary General receives the request he brings the dispute before a conciliation commission comprised as follows:

The State or States constituting one of the parties to the dispute shall appoint:

(a) one conciliator of the nationality of that State or of one of those States, who may or may not be chosen from the list referred to in paragraph 1; and

(b) one conciliator not of the nationality of that State or of any of those States, who shall be chosen from the list.<sup>309</sup>

The fifth member, who serves as chairman, is selected from the list by the other four members. The Secretary General makes any appointment that is not made within prescribed time periods.

Paragraphs 5 and 6 of the annex provide:

5. The Commission shall hear the parties, examine the claims and objections, and make proposals to the parties with a view to reaching an amicable settlement of the dispute.

6. The Commission shall report within twelve months of its constitution. Its report shall be deposited with the Secretary-General and transmitted to the parties to the dispute. The report of the Commission, including any conclusions stated therein regarding the facts or questions of law, shall not be binding upon the parties and it shall have no other character than that of recommendations submitted for the consideration of the parties in order to facilitate an amicable settlement of the dispute.

Paragraph 7 of the annex provides that the expenses of the commission will be borne by the United Nations. The conference requested the General Assembly to note and approve that provision at its Twenty-Fourth Session. The General Assembly did so on December 8, 1969.<sup>310</sup>

The annex reflects to a degree the stresses and strains inside the group that put forward the compromise proposal. The emphasis in paragraph 6 of the annex that the report of a conciliation commission is not binding on the parties and is solely of a recommendatory character may have been influenced not only by the struggle within the conference but also

<sup>308</sup> Art. 66 (b).

<sup>309</sup> Annex, par. 2.

<sup>310</sup> General Assembly Res. 2534 (XXIV). For discussion on the item in the Assembly, see Doc. A/PV.1825, at 56-68 (1969).

by the cultural antipathy to formal adjudication that is a feature of a number of Asian and African societies.<sup>311</sup> These same factors may also have a bearing on the elliptical fashion in which the authority of a commission to present conclusions of fact and law in its report to the Secretary General is set forth.

Neither the nineteen-state proposal nor the earlier thirteen-state proposal for a conciliation-arbitration procedure contained a provision expressly authorizing a conciliation commission to make findings of fact and of law. On the other hand, the 1968 proposal by the United States on settlement of disputes required that the report of the conciliation commission "deal fully with the factual and legal elements of the dispute" if a friendly solution could not be effected.<sup>312</sup>

This United States proposal was discussed in connection with the transformation of the thirteen-state 1968 amendment into the nineteen-state 1969 proposal. There was a consensus among the co-sponsors that it was not desirable to give the conciliation process too many of the aspects of a legal proceeding. Because conciliation, if unavailing, could be followed by arbitration, a duplication of procedures was to be avoided.

In the private discussions that preceded the final compromise proposal, the United States and the other states concerned with adequate disputes-settlement provisions made it clear that a conciliation procedure that was limited to a "good offices" proposal would not be acceptable. A form of disputes-settlement that would determine the legality of any assertion to terminate a treaty obligation was a *sine qua non*. To achieve this, a provision empowering the conciliation commission to decide controverted issues of law and fact was essential. The somewhat convoluted language of the second sentence of paragraph 6 of the annex represents the acceptance of that position.

The adjudicatory aspects of the conciliation procedure are also underlined in another change made in the text of the annex to the nineteen-state amendment. The first sentence in paragraph 3 provided: "The commission thus constituted shall establish the facts and make proposals to the parties with a view to reaching an amicable settlement of the dispute."<sup>313</sup> In the annex to the convention, that clause has been changed to provide that "the commission shall hear the parties, examine the claims and objections and make proposals to the parties. . . ." <sup>314</sup> The changes again resulted from insistence that if there was to be no arbitration then conciliation must embody the essentials of proceedings of a judicial character. The original requirement of "establishing the facts" has been broadened to examining "the claims and objections," with the necessary consequence that the legal aspects be taken under consideration. The requirement that the commission hear

<sup>311</sup> See R. David and J. E. C. Brierley, *Major Legal Systems in the World Today* 442, 463 (1968).

<sup>312</sup> U.N. Doc. A/CONF.39/C.1/L.355, Art. 5, par. 2 of the Annex (1969).

<sup>313</sup> U.N. Doc. A/CONF.39/C.1/SR.105, at 16 (1969).

<sup>314</sup> Par. 5.



the parties was added to make clear that the commission was not to function as a go-between but as a tribunal.

In one respect the uncertainties of the International Law Commission's original article remain: There is no provision that prescribes what can or cannot be done after a conciliation commission has made its report. If the commission should find in favor of the state urging the invalidity of a treaty as a ground for release from a treaty commitment, that state, even though the findings are purely recommendatory, would have a reasonable legal basis for taking the measure proposed in the notification it had made under Article 65. The commission's findings would also support defense against any charge of breach against that state for then proceeding to take the measure proposed, provided such measure was consistent with Article 69 on the consequences of the invalidity of a treaty.

If a conciliation commission should find, on the other hand, that a claim, say, of a right to terminate on the ground of fundamental change of circumstances had *not* been made out, would there be any legal barrier to the claimant state's carrying out the actions authorized under Article 70 as the consequence of the termination of a treaty? A characterization of the commission's findings as either non-binding or recommendatory is not an answer to this problem, because the anterior question—the effect of a unilateral assertion that a treaty is terminated—remains open. The reasonable and sensible position in these circumstances is that the overriding principle of *pacta sunt servanda* applies and that, under Article 26, the claimant state, to be acting in good faith, must continue to perform its obligations.

The concluding section of Part V contains four articles dealing with the consequences of the invalidity, termination, or suspension of a treaty. Articles 69 and 70 treat, respectively, the legal effect of a treaty established as invalid under the convention and the legal consequences of termination of a valid treaty. Article 71<sup>315</sup> deals with the consequences of a treaty conflicting with a peremptory norm of general international law. Article 72 governs the legal consequences of suspension of the operation of a treaty. Although a substantial improvement was made in Article 69 and a clarification introduced in Article 72, the general framework proposed by the Commission for this section was endorsed by the conference.

The basic principle in Article 69 was phrased: "The provisions of a void treaty have no legal force." That formulation failed to make clear that the detailed rules that followed on the consequences of the invalidity of a treaty applied only to treaties which had been established as invalid under the convention. Australia, France, and the United States introduced amendments to express this point.<sup>316</sup> After consideration of the text proposed by the drafting committee and further discussion in the committee of the whole, paragraph 1 of Article 69 was changed to read: "A treaty the invalidity of

<sup>315</sup> P. 535 above.

<sup>316</sup> U.N. Docs. A/CONF.39/C.1/L.297 (Australia), A/CONF.39/C.1/L.363 (France), A/CONF.39/C.1/L.360 (United States) (1968).

which is established under the present Convention is void. The provisions of a void treaty have no legal force."<sup>317</sup> Paragraph 2 provides:

2. If acts have nevertheless been performed in reliance on such a treaty:
  - (a) each party may require any other party to establish as far as possible in their mutual relations the position that would have existed if the acts had not been performed;
  - (b) acts performed in good faith before the invalidity was invoked are not rendered unlawful by reason only of the invalidity of the treaty.

However, when a treaty has been found invalid under an article relating to fraud, corruption, or coercion, paragraph 2 does not apply "with respect to the party to which the fraud, the act of corruption or the coercion is imputable."<sup>318</sup> The United States took the position that the rules in paragraph 2 (a) and the exception with respect to fraud, corruption, and coercion in paragraph 3, though reasonable in theory, would not always prove satisfactory in practice. Its proposal to delete those rules was also grounded on the theory that the sanctions impinged on the subject of state responsibility, a topic excluded from the scope of the convention by Article 73.<sup>319</sup> The expert consultant, Sir Humphrey Waldock, stated in his summary that the United States and Switzerland "had objected, not without some justification, that the provisions adopted [by the Commission] might prove too strict. It was for the Conference to decide whether or not the usefulness of those provisions made up for the shortcomings that had been pointed out."<sup>320</sup> The conference decided by a substantial majority to retain paragraphs 2 and 3 in the form proposed by the Commission.<sup>321</sup>

Article 70 defines the legal consequences of the termination of a treaty under its provisions or in accordance with the convention. The gist of the reasonable rule in this article, which closely paraphrases Article 33 (d) of the Harvard Draft,<sup>322</sup> is that such termination, while releasing the parties from the obligation of further performance, "does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination."<sup>323</sup>

Article 72 on the consequences of the suspension of the operation of a treaty is designed to emphasize that, while suspension relieves the parties between which the operation of a treaty is suspended from performance of their mutual obligations, the "legal nexus between the parties established by the treaty remains intact."<sup>324</sup> The Commission's commentary also explains that paragraph 2 carries further the point as to the continuing legal nexus by specifying the obligation of the parties to do nothing to prevent resumption of the operation of the treaty "as soon as the ground or cause of suspension ceases."<sup>325</sup>

The Mexican Delegation introduced an amendment to Article 72, somewhat akin to the language in Article 18, which would have added an obliga-

<sup>317</sup> Official Records, First Session 493.

<sup>318</sup> Par. 3.

<sup>319</sup> Official Records, First Session 446.

<sup>320</sup> *Ibid.* at 447.

<sup>321</sup> *Ibid.* The final text was slightly revised by the drafting committee.

<sup>322</sup> 29 A. J. I. L. Supp. 664 (1935).

<sup>323</sup> Art. 70, par. 1.

<sup>324</sup> I.L.C. Report, note 20 above, at 94.

<sup>325</sup> *Ibid.*

tion to refrain during the period of the suspension from acts which would "frustrate the object of the treaty."<sup>326</sup> In its report on the article, the drafting committee proposed deletion of the expression "to render . . . impossible," which had been suggested by the Commission, and substitution of the words "to obstruct." This improvement, which not only resolved the point raised by the Mexican amendment but also avoided possible confusion with Article 61 on supervening impossibility of performance, was adopted without objection.<sup>327</sup>

#### MISCELLANEOUS PROVISIONS (ARTICLES 73-75)

Part VI of the convention as proposed by the Commission contained two articles: *Cases of State succession and State responsibility* and *Case of an aggressor State*. The latter is treated above as an exception to Article 35, *Treaties providing for obligations for third States*.

The conference made two changes in Part VI. To the catalog of questions of state succession and state responsibility excluded from the applicability of the convention by Article 73, the conference added treaty questions arising from the outbreak of hostilities. The Commission had recognized that

the state of facts resulting from an outbreak of hostilities may have the practical effect of preventing the application of the treaty in the circumstances prevailing . . . [and] that questions may arise as to the legal consequences of an outbreak of hostilities with respect to obligations arising from treaties. But it considered that in the international law of today the outbreak of hostilities between States must be considered as an entirely abnormal condition, and that the rules governing its legal consequences should not be regarded as forming part of the general rules of international law applicable in the normal relations between States. . . .<sup>328</sup>

Accordingly it did not mention hostilities in the draft articles.

Hungary and Poland introduced an amendment<sup>329</sup> to add a reference to "outbreak of hostilities between States" at the end of the article proposed by the Commission; Switzerland introduced a similar proposal. After a surprisingly brief discussion, in which only one delegation<sup>330</sup> supported the omission of the reference to hostilities, the principle contained in the two amendments was adopted by a vote of 72 in favor, 5 opposed, with 14 abstentions.<sup>331</sup>

The conference also added a new Article 74 to Part VI, which provides that severance or absence of diplomatic or consular relations between states does not prevent the conclusion of treaties between those states. The article grew out of an amendment by Chile to Article 63, which provides that in principle "the severance of diplomatic or consular relations between parties to a treaty does not affect the legal relations established between them by the treaty. . . ." A substantial majority of the conference supported the new

<sup>326</sup> U.N. Doc. A/CONF.39/C.1/L.357 (1968).

<sup>327</sup> Official Records, First Session 484.

<sup>328</sup> I.L.C. Report, note 20 above, at 95.

<sup>329</sup> U.N. Doc. A/CONF.39/C.1/L.279 (1968).

<sup>330</sup> Uruguay.

<sup>331</sup> Official Records, First Session 453.

article, perhaps persuaded by its sponsor that "although it might be considered unnecessary to state such a self-evident fact . . . the absence of such a provision might lead to the assumption that States could not conclude treaties among themselves if diplomatic relations had been severed."<sup>332</sup> The rule in the article is in accordance with modern treaty practice.

DEPOSITARIES, NOTIFICATIONS, CORRECTIONS AND REGISTRATION  
(ARTICLES 76-80)

In his searching article, "The Depositary of International Treaties," in this JOURNAL, Ambassador Rosenne pointed to the fact that, despite its unusual character, the institution of depositary had received little attention from scholars.<sup>333</sup> Only in 1966, with the adoption by the Commission of the draft articles on the law of treaties, did it emerge as "a completely independent institution of contemporary international law, with an independent rôle and independent rights and duties in the general context of the modern law of treaties, and not merely as a kind of adjunct to the states themselves concerned in the treaty, regardless of whether the depositary is one of those states or not."<sup>334</sup>

In this highly technical field, which was considered during the closing days of the first session of the conference, it would have been quite understandable had the exhausted delegates somewhat perfunctorily adopted the text proposed by the Commission. Nevertheless, the conference gave most careful attention to the Commission's proposals and clarified them in a number of respects.

The Commission's text of the article on depositaries of treaties dealt with the identity of the depositary, the method of its designation, and the international character of its functions:

1. The depositary of a treaty, which may be a State or an international organization, shall be designated by the negotiating States in the treaty or in some other manner.
2. The functions of a depositary of a treaty are international in character and the depositary is under an obligation to act impartially in their performance.<sup>335</sup>

Mr. Castrén opened the debate by proposing to amend the first paragraph to cover agreements such as the Test Ban and Outer Space Treaties for which there were multiple depositaries.<sup>336</sup> Although Sir Humphrey Waldock had earlier expressed doubt "whether the precedent of a trinity of depositaries"<sup>337</sup> required a similar amendment to the definition of depositary proposed in his first report (but subsequently abandoned), the Finnish amendment substituting "one or more states" for "a state" was adopted by a substantial majority.<sup>338</sup> A second amendment proposed by Mexico to

<sup>332</sup> *Ibid.* at 383.

<sup>334</sup> *Ibid.* at 926.

<sup>335</sup> Official Records, First Session 457.

<sup>337</sup> Waldock, Fourth Report on the Law of Treaties, 1965 I.L.C. Yearbook (II) 15, U.N. Doc A/CN.4/177 and Add. 1 and 2 (1965).

<sup>338</sup> Official Records, First Session 468.

<sup>333</sup> 61 A.J.I.L. 923, 925-926 (1967).

<sup>336</sup> I.L.C. Report, note 20 above, at 96.

clarify the paragraph by specifying that the chief administrative officer of an international organization might be designated as depositary was also adopted.<sup>339</sup>

The principle of paragraph 2 underscoring the international character of the depositary's function and its duty to act impartially was welcomed by the committee of the whole. In addition, it adopted two proposals affirming the rule on impartiality in certain special circumstances, which the Commission believed were included within its formulation.<sup>340</sup>

The United States, as the depositary of more international treaties than any other country, played an active rôle in the discussion of the depositary articles. The first part of the United States amendment to Article 77 on *Functions of depositaries* was intended to "make it clear that any functions not specified either in the treaty or in [the article under consideration] could appropriately be performed by the depositary by agreement of the States concerned, without the treaty actually having to be amended."<sup>341</sup> In introducing the United States amendment Mr. Bevans stated that

its purpose was to bring the article into conformity with customary depositary practice. A treaty normally specified at least some of the functions to be performed by the depositary. Certain other functions were understood to exist as a result of practice. From time to time, however, certain functions needed to be performed which had not been anticipated and had therefore not been specified in the treaty. Such functions were usually related to the customary depositary functions and could be performed more efficiently and conveniently by the depositary than by any other agent. In such cases, the States concerned agreed to entrust the new functions to the depositary.<sup>342</sup>

Another paragraph of the U.S. amendment proposed that registration of the treaty with the Secretariat of the United Nations should be included as a depositary function. This change would not only fix clearly the responsibility for the performance of this important function but also insure that accurate data would be provided since in the nature of things the depositary could be expected to have complete and authoritative information regarding the treaty.

Ten amendments to Article 77 were adopted by the committee of the whole.<sup>343</sup> Their combined effect was to produce in paragraph 1 a more comprehensive catalog of depositary functions than had originally been envisioned by the Commission.

As indicated in the discussion of Article 48,<sup>344</sup> vitiating error "as to a fact or situation which was assumed by that State to exist at the time when the treaty was concluded and formed an essential basis of its consent to be bound by a treaty" has seldom arisen in international practice. Errors "re-

<sup>339</sup> *Ibid.*

<sup>340</sup> Official Records, First Session 467, par. 55, remarks of Sir Humphrey Waldock.

<sup>341</sup> *Ibid.* at 459.

<sup>342</sup> *Ibid.*

<sup>343</sup> Official Records, First Session 468. Five of the proposals adopted were sponsored by the United States.

<sup>344</sup> P. 529 above.

lating only to the wording of the text of a treaty" are not infrequent.<sup>345</sup> Article 79 contains simple and sensible rules for the prompt correction of such errors in texts and in certified copies of treaties.<sup>346</sup>

In its comments on Article 80 on *Registration and publication of treaties*<sup>347</sup> the Organization of American States suggested that the article would be improved if it were to contain a provision authorizing the depositary of a treaty to transmit it to the United Nations Secretariat for registration and publication. The United States and Uruguay introduced an amendment along those lines at the eightieth meeting of the committee of the whole.<sup>348</sup> In speaking to the amendment Mr. Bevans said:

[T]he United Nations Secretariat was in favour of the registration of treaties by depositaries, but in some instances certain technical difficulties stood in the way of such a procedure. For example, many treaties for which the Organization of American States (OAS) was depositary did not contain any provision regarding their registration, and in order for them to be registered with the United Nations, the OAS had first to obtain the agreement of all parties. Similarly, when States Members of the United Nations were depositaries for treaties containing no provision on registration, they were unable to register them unless every party agreed. The joint amendment was designed to overcome those technical difficulties.<sup>349</sup>

When several delegations questioned whether the amendment would be compatible with Article 102 of the United Nations Charter, the expert consultant expressed the view that it would simplify the registration of certain types of multilateral treaties. The amendment was then put to the vote and adopted without opposition.<sup>350</sup>

The adoption by the conference of sound rules governing depositaries, notifications, corrections, and registration should bring uniformity and clarity to an area of international law which hitherto has not been governed by any generally accepted body of rules.

#### CONCLUSION

This codification of provisions on depositary practice is a final demonstration of the great value of the convention in providing solutions for a host of technical problems in the negotiation, adoption and execution of treaties.

<sup>345</sup> See, e.g., Procès-verbal of rectification of the International Convention on Load Lines, 1966, of Jan. 30, 1969, 20 U.S. Treaties 17; T.I.A.S., No. 6629. A second *procès-verbal* of rectification of that convention was signed on May 5, 1969, T.I.A.S., No. 6720.

<sup>346</sup> In discussing the relationship between Arts. 48 and 79 the Commission noted that an error or inconsistency in the text of a treaty "may be due to a typographical mistake or to a misdescription or misstatement due to a misunderstanding and the correction may affect the substantive meaning of the text as authenticated. If there is a dispute as to whether or not the alleged error or inconsistency is in fact such, the question is not one simply of correction of the text but becomes a problem of mistake which falls under article [48]. The present article only concerns cases where there is no dispute as to the existence of the error or inconsistency." I.L.C. Report, note 20 above, at 99.

<sup>347</sup> U.N. Doc. A/CONF. 39/7, at 40, 43-44 (1968).

<sup>348</sup> U.N. Doc. A/CONF.39/C.1/L.376 (1968).

<sup>349</sup> Official Records, First Session 470 (1968).

<sup>350</sup> *Ibid.* at 471.

Had the solution of those technical problems been the only achievement of the treaties conference, the years of study and toil would have been well justified. But, as the foregoing discussion hopefully has demonstrated, much more was achieved.

One substantial achievement is the provision of a mechanism to adjust the conflicting demands between the forces of stability and change. By codifying the doctrines of *jus cogens* and *rebus sic stantibus* the convention provides a framework for dealing with change in an orderly fashion. By reasserting the principle of *pacta sunt servanda* it strengthens the customary law rule which has always been the keystone of the treaty structure.

The limitation of grounds for challenging treaty obligations to those contained in the convention is, in the context of the convention as finally agreed, a buttress to the stability of treaties, as are the articles on separability and loss of a right to challenge the continued applicability of a treaty because of agreement or implied acquiescence in its continued effectiveness. Further, the fact that under Article 4 the convention applies only to future treaties eliminates very many of the fears about possible abuses. Treaties that are entered into in contemplation of the application of the convention can be negotiated or drafted to guard against possible misapplication of its provisions.

A major achievement was the provision for reference of disputes concerning *jus cogens* to the International Court of Justice. This reflects a willingness on the part of many states that had voiced disappointment with the Court in 1966 to recognize its signal appropriateness as a forum for resolution of disputes relating to *jus cogens*—the one principle that presents the most basic issue in the development of a world rule of law.

In addition, the procedures for dealing with disputes are not only an essential element in maintaining the stability of treaty relationships but are the first such procedures to be included in a general codification treaty. Even though the report of the conciliation commission is not "binding," the determination that a party is either justified or not justified in claiming release from a treaty obligation will constitute a powerful deterrent to unwarranted action on either side of a dispute. The provision for meeting the expenses of the commission is a desirable innovation and a worthwhile investment, since the concern of many newly independent and small states with the cost of third-party settlement procedures has been a very real obstacle to their general acceptability.

The treaty on treaties does not approach perfection. The international legislative process remains much too primitive a mechanism to produce an approach to perfection. This convention is, however, in an unspectacular and earthbound way, a giant step for mankind toward a world in which the rule of law will be not a dream but a reality.

# THE LATERAL BOUNDARIES OF THE CONTINENTAL SHELF AND THE JUDGMENT OF THE INTERNATIONAL COURT OF JUSTICE IN THE NORTH SEA CONTINENTAL SHELF CASES

*By Etienne Grisel \**

## INTRODUCTION

A rule of customary international law of recent origin has conferred sovereign rights over the continental shelf to individual states for the limited purposes of exploration and exploitation. The attribution of such exclusive jurisdiction required the delimitation of boundaries between the submarine areas appertaining to various littoral states. The importance of such partition of the seabed and subsoil is self-evident, but two points do call for comment. First, since the shelf may be considerably extended in the future according to the criterion of exploitability, the method now adopted will have a constantly growing significance. Second, the acquisition of the sea bottom by coastal nations has created inequalities between them, depending on their relative degree of technical development as well as on their geographical circumstances. The drawing of boundaries separating their respective shelves can aggravate or diminish these inequalities.

Article 6 of the 1958 Convention on the Continental Shelf provides:

1. Where the same continental shelf is adjacent to the territories of two or more States whose coasts are opposite each other, the boundary of the continental shelf appertaining to such States shall be determined by agreement between them. In the absence of agreement, and unless another boundary line is justified by special circumstances, the boundary is the median line, every point of which is equidistant from the nearest points of the baselines from which the breadth of the territorial sea is measured.

2. Where the same continental shelf is adjacent to the territories of two adjacent States, the boundary of the continental shelf shall be determined by agreement between them. In the absence of agreement, and unless another boundary line is justified by special circumstances, the boundary shall be determined by application of the principle of equidistance from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured.

Since the determination of boundaries between the continental shelves of adjacent states gives rise to the most difficult problems and to some major disputes, the present paper deals with the matter regulated in paragraph 2 of Article 6. The first part will be devoted to the interpretation of this provision, which involves three principal issues: (1) What is the exact

\* LL.M. (Harvard); Docteur en Droit (Lausanne).



rôle attributed to agreement? (2) How is the so-called "principle of equidistance" to be applied in concrete cases? (3) What is the degree of flexibility of this rule and how are the words "special circumstances" to be understood?

Most countries have not yet ratified the Convention on the Continental Shelf,<sup>1</sup> and the question thus arises as to what rules are applicable to the drawing of the lateral boundaries when one or both of the parties are not bound by that convention. Such was the situation in the *North Sea Continental Shelf Cases* between Germany on the one hand and Denmark and The Netherlands on the other, which were recently decided by the International Court of Justice. The waters of the North Sea are shallow, and the whole bottom may be regarded as continental shelf, the western part of which incontestably belongs to Great Britain. The eastern part must be divided between Norway, Denmark, the Federal Republic of Germany, The Netherlands, Belgium, and France. Germany concluded a convention with each of its neighbors (Denmark and The Netherlands), which delimited the boundary of the shelf in the immediate vicinity of the coast according to the principle of equidistance.<sup>2</sup> Both Denmark and The Netherlands wished the prolongation of the frontier lines seaward to be made under the same rule. The Federal Republic disagreed with that view, since the lines thus drawn would meet at a relatively short distance from its coast and thereby considerably narrow its portion of the North Sea continental shelf.<sup>3</sup> After unfruitful negotiations, the parties decided to submit the dispute to the International Court of Justice. Germany concluded with each of its opponents a Special Agreement, Article 1 of which requested the Court to decide:

What principles and rules of international law are applicable to the delimitations between the Parties of the areas of the continental shelf in the North Sea which appertain to each of them beyond the partial boundary determined by the above-mentioned Convention. . . ?

Germany argued before the Court that it was not bound by the rules embodied in Article 6 of the 1958 Convention, since it was not a party to that treaty and these rules had not become part of customary international law. It claimed that in a case such as that of the North Sea, all coastal states have a right to a "just and equitable share" of the continental shelf. It contended subsidiarily that, if Article 6 were held applicable, then the

<sup>1</sup> As at Dec. 31, 1967, 46 states had signed the convention, and 37 had ratified it. Multilateral Treaties, List of Signatures, Ratifications, Accessions, etc., as at 31 December 1967, U.N. Doc. St./Leg./Ser.D/1 at 331. Among the principal Powers presently parties to the convention are France, the Soviet Union, the United Kingdom and the United States.

<sup>2</sup> F. Münch, "Die Anrufung des Internationalen Gerichtshofes durch die Bundesrepublik Deutschland und ihre Nachbarn in Fragen des Festlandsockels in der Nordsee," 27 *Zeitschrift für ausländisches öffentliches Recht u. Völkerrecht* 725 (1967).

<sup>3</sup> Judgment of the International Court of Justice of Feb. 20, 1969, in the *North Sea Continental Shelf Cases*, [1969] I.C.J. Rep. 14-18.

particular configuration of its coast constituted a "special circumstance" within the meaning of Article 6 and justified a departure from the line of equidistance.

Denmark and The Netherlands, whose cases had been joined by order of the Court, took the position that Article 6 expressed a rule of law mandatory for all states, including those not parties to the convention. They further contended that the principle of equidistance was an essential part and an inevitable consequence of the doctrine of the continental shelf and that it had been a customary rule of international law even before 1958; and that in any event it had become one through the practice of numerous states since the Geneva Conference. The two states alternatively alleged that Germany had assumed by its conduct the obligations deriving from the convention, in particular from Article 6, and was therefore estopped to deny the applicability of this article to the North Sea continental shelf.

In its judgment of February 20, 1969, the Court, by eleven votes to six, first rejected the contentions of the Federal Republic relating to an "equitable apportionment" of the shelf, "at least in the particular form they have taken."<sup>4</sup> It then refuted every argument advanced by Denmark and The Netherlands. It denied that Germany had accepted Article 6 of the convention, either expressly or by attitude. It further held that the principle of equidistance was not "an inescapable *a priori* accompaniment of basic continental shelf doctrine,"<sup>5</sup> but rather a rule which was purely conventional when adopted in 1958 and which had not since then become a binding custom. The Court finally decided that the lateral boundaries between the shelves of the parties "must be the object of agreement between the States concerned, and that such agreement must be arrived at in accordance with equitable principles."<sup>6</sup>

The opinion bears on the question whether the rule of equidistance embodied in Article 6 of the convention is part of the customary law. The answer given being clearly negative, that issue can be set aside, and we will therefore deal first with the interpretation of Article 6, paragraph 2, and second with the legal régime applicable to the lateral boundaries of the states which are not bound by that provision.

#### ARTICLE 6, PARAGRAPH 2, OF THE CONVENTION ON THE CONTINENTAL SHELF

##### I. THE CLAUSE RELATING TO AGREEMENT

Article 6, paragraph 2, of the Continental Shelf Convention provides that the boundary between the continental shelves of two adjacent states "*shall be determined by agreement between them. In the absence of agreement . . . the boundary shall be determined by application of the principle of equidistance. . . .*" [Emphasis supplied.] Interestingly

<sup>4</sup> *Ibid.*, at 22.

<sup>5</sup> *Ibid.*, at 33.

<sup>6</sup> *Ibid.*, at 47.

enough the corresponding provision of the Convention on the Territorial Sea, Article 12, is formulated quite differently:

Where the coasts of two States are opposite or adjacent to each other, neither of the two States is entitled, *failing agreement between them to the contrary*, to extend its territorial sea beyond the median line every point of which is equidistant. . . . [Emphasis supplied.]

While the reference to agreement in the latter rule clearly amounts to nothing more than a statement that the median line principle is not *jus cogens*, the wording of the former apparently permits another interpretation, namely, that adjacent states have an *obligation* to determine the boundaries of their shelves by agreement. Yet that construction would raise troublesome questions as to the exact content of the obligation and as to its relationship to the rights and duties derived from the principle of equidistance laid down in the second sentence of paragraph 2. A study of the precedents and of the preparatory work throws some light on the meaning of this provision.

The first treaty relating to the continental shelf, the Gulf of Paria Treaty of 1942, mainly purported to delimit the boundary between the submarine areas which appertain to each of the parties.<sup>7</sup> Furthermore, the oldest actual claim made by an individual state over the continental shelf, the Truman Proclamation of 1945, expressly stated: "In cases where the continental shelf extends to the shores of another State, the boundary shall be determined by the United States and the State concerned in accordance with equitable principles."<sup>8</sup> It thus appears that, when states began asserting rights over the seabed and subsoil, they considered that the question of frontiers had to be settled by special agreement between them and their neighbors.

No doubt the International Law Commission had those two precedents in view when it started to deal with the matter. The Memorandum submitted by the Secretariat quoted them.<sup>9</sup>

At the 1950 session most members of the Commission felt unable to establish a general principle in respect of boundaries, feeling that any substantive rule drafted at the time "would be pure legal speculation which would jeopardize the whole of the Commission's work."<sup>10</sup> The Report of 1950 to the General Assembly merely stated: "Where two or more neighboring States were interested in the submarine areas of the continental shelf outside their territorial waters, boundaries should be delimited."<sup>11</sup>

In his Second Report on the Régime of the High Seas, François proposed a draft Article 9 which read:

If two or more States are interested in the same continental shelf outside the territorial waters, the limits of the parts of the shelf

<sup>7</sup> U.N. Doc. A/CN.4/32 at 57. See F. Vallat, "The Continental Shelf," 23 Brit. Yr. Bk. Int. Law 333, 334 (1946).

<sup>8</sup> 10 Fed. Reg. 12303 (1945); 4 Whiteman, Digest of International Law 752.

<sup>9</sup> U.N. Doc. A/CN.4/32 at 108 (1950).

<sup>10</sup> [1950] I.L.C. Yearbook (I) 234, par. 56.

<sup>11</sup> *Ibid.*, at 384, par. 199.

belonging to each should be fixed by agreement between them. In the absence of agreement, the demarcation between the continental shelves of two neighboring States should be constituted by the prolongation of the line separating the territorial waters, and the demarcation between the continental shelves of two States separated by the sea should be constituted by the median line between the two coasts.<sup>12</sup>

He added in a *note* that the lateral boundary might be a line perpendicular to the coast at the point where the land frontier reached the sea. But Hudson objected that "no such line existed either in law or in fact."<sup>13</sup> And he also "pointed out a significant discrepancy between the two sentences constituting article 9. . . ." According to him, since it was followed by the rule of the second sentence, "the first sentence was, as it were, the expression of a wish. . . ." For that reason, he agreed with Chairman Brierly that "the Commission should lay down the essential rule that it was the duty of States to reach agreement."<sup>14</sup>

However, other members of the Commission found that merely to set forth such a rule would be dangerous. Scelle feared that it would authorize the stronger party to exert pressure on the weaker.<sup>15</sup> He suggested that, failing agreement, the states concerned should be either obliged to submit the matter to arbitration, or otherwise be prohibited to exploit the areas in dispute: "If two governments could not reach agreement as to the partition of the continental shelf, neither State was entitled to exploit it."<sup>16</sup> El Khouri noted that "parties could not be compelled to reach agreement."<sup>17</sup> The Commission finally decided, by 8 votes to 2, with 2 abstentions, to provide for compulsory arbitration, and submitted the following draft article in its Report of 1951 to the General Assembly:

Two or more States to whose territories the same continental shelf is contiguous should establish boundaries in the area of the continental shelf by agreement. Failing agreement, the parties are under the obligation to have the boundaries fixed by arbitration.<sup>18</sup>

The draft of 1951 was submitted to the Members of the United Nations. Only Ecuador and the Union of South Africa expressly approved of the rule under which the parties simply have to reach agreement in each case. The other states criticized it. Denmark and the United Kingdom reproached it for not even giving "guiding principles" to be followed in the course of the negotiations or by arbitrators. Israel felt that such *pactum de contrahendo* had dubious legal value. The Netherlands would have preferred the adoption of "specific rules of law,"<sup>19</sup> while Yugoslavia suggested the median line as a solution to the problem. Interestingly enough, the writers who had expressed themselves upon the same draft article were

<sup>12</sup> U.N. Doc. A/CN.4/42 at 70 (1951).

<sup>13</sup> [1951] I.L.C. Yearbook (I) 237, par. 122.

<sup>14</sup> *Ibid.*, at 286, pars. 107, 114.

<sup>15</sup> *Ibid.*, at 288, par. 5.

<sup>16</sup> *Ibid.*, at 289, par. 16.

<sup>17</sup> *Ibid.*, at 291, par. 33.

<sup>18</sup> [1951] I.L.C. Yearbook (II) 143.

<sup>19</sup> U. N. Doc. A/CN.4/60 at 68, 70, 72 (1953).

less critical than most governments. Thus Young remarked: "In its approach the article shows a wise appreciation of the impossibility of laying down any universal rule. . . . Each situation is unique, and can be solved satisfactorily only in the light of its own facts and the particular interests there involved."<sup>20</sup>

Numerous governments having expressed their reluctance to subject the matter of boundaries in the shelf to compulsory arbitration, François' Fourth Report proposed a new draft Article 7:

Two or more States to whose territories the same continental shelf is contiguous *should* establish boundaries in the area of the continental shelf by agreement. Failing agreement, the parties are *under the obligation* to submit the dispute to conciliation procedure. [Emphasis supplied.]

In that version, the obligation of the parties was not so much to reach agreement as to "seek a solution . . . in accordance with the rules agreed between them for the peaceful settlement of disputes. . . ." <sup>21</sup> The provision thus had considerable flexibility.

For the 1953 session, however, François submitted a different text, which read: "The boundary of the continental shelf appertaining to each State should be drawn according to the principle of equidistance from the respective coastlines of the adjacent States."<sup>22</sup> Compulsory arbitration was expressly provided for in cases where the parties did not agree on how the frontier line had to be drawn under the rule of equidistance.<sup>23</sup> In the course of the discussion, Córdova remarked: "There was no reason . . . why the system laid down in article 7 should be mandatory. . . ." <sup>24</sup> It was therefore decided that the rule of equidistance would apply only "in the absence of agreement." The rule as such had the general approval of the Commission, except for Kozhevnikov, who found it inappropriate to insert in the convention "provisions of a highly technical nature" instead of a "flexible formula."<sup>25</sup> His proposal to maintain the text submitted in François' Fourth Report was rejected by 10 votes to 2, with 1 abstention.<sup>26</sup> By 9 votes against 3, with 1 abstention, the Commission adopted an Article 7, paragraph 2 of which read:

Where the same continental shelf is contiguous to the territories of two adjacent States, the boundary of the continental shelf appertaining to such States is, in the absence of agreement between those States, or

<sup>20</sup> R. Young, "The International Law Commission and the Continental Shelf," 46 A. J. I. L. 123, 126 (1952). See also De Azcárraga, quoted in U.N. Doc. A/CN.4/60 at 74 (1953).

<sup>21</sup> U.N. Doc. A/CN.4/60 at 129 (1953).

<sup>22</sup> [1953] I.L.C. Yearbook (I) 106, par. 37.

<sup>23</sup> The reference to arbitration in Art. 7 was deleted later because the draft articles contained a general clause relating to compulsory arbitration.

<sup>24</sup> [1953] I.L.C. Yearbook (I) 107, par. 43.

<sup>25</sup> *Ibid.*, at 128, par. 41.

<sup>26</sup> *Ibid.*, at 133, par. 44. Lauterpacht, *ibid.*, at 131, par. 9, had strongly opposed the solution advocated by his Soviet colleague.

unless another boundary line is justified by special circumstances, determined by application of the principle of equidistance. . . .<sup>27</sup>

This provision was modified in 1956, when the Commission completed its final draft. The text which served as a basis for the deliberations at the Geneva Conference was identical to the present Article 6. It was not adopted without discussion. Some delegations found the first sentence, relating to agreement, "obvious and unnecessary." The representative of Colombia pointed out: "It was regrettable that direct negotiations between States should be proposed as the first step. . . . Much future disagreement could be avoided if the international principle of equidistance . . . were given precedence over private agreements. . . ." <sup>28</sup> Others took the position that the best solution would be to provide only for special agreements to be reached by the parties themselves, since no general rule would be satisfactory in all cases.<sup>29</sup> The draft of the International Law Commission therefore appeared as a compromise between those two views and was vigorously defended by the British delegate: "If both the States involved were satisfied with the boundary provided by the median line, no further negotiation would be necessary; if a divergence from the median line appeared to be indicated by special circumstances, another boundary would be established by negotiation, but the median line would still serve as the starting point."<sup>30</sup> Article 6 of the convention was eventually accepted without modification by 39 votes to 2, with 15 abstentions.<sup>31</sup>

Until the final adoption of Article 6 in 1958, agreement was thought to be the basic solution to the problem of the shelf boundaries. As the International Court of Justice pointed out in the *North Sea Cases*, the legal situation was then "governed by two beliefs;—namely, first, that no one single method of delimitation was likely to prove satisfactory in all circumstances, and that delimitation should, therefore, be carried out by agreement (or by reference to arbitration). . . ." <sup>32</sup> This idea, which several authors approved,<sup>33</sup> was embodied in the first drafts prepared by the International Law Commission. Yet it appeared to many to have major disadvantages. First, it was argued, a *pactum de contrahendo* merely stating that the parties must reach agreement on a matter has little, if any, value in international law, at least in an area where no clear principle governs (as was the case of lateral boundaries before 1958). In the absence of any objective criterion as to what the proper frontier line should be, each state concerned could take almost any position in the course of negotiations and never come to an agreement with its neighbors. A third party (for instance, an arbitrator) would thus be unable to establish whether one or both of the parties are not acting in good faith. Second, it was feared that, failing agreement, the question of boundaries would remain entirely unresolved, and submarine areas claimed by more than one country could not be ex-

<sup>27</sup> [1953] I.L.C. Yearbook (II) 213.

<sup>28</sup> U.N. Doc. A/Conf. 13/42 at 10, par. 14.

<sup>29</sup> *Ibid.*, at 21, par. 30.

<sup>31</sup> *Ibid.*, at 98, par. 35.

<sup>32</sup> See note 20 above.

<sup>30</sup> *Ibid.*, at 92, par. 15.

<sup>32</sup> [1969] I.C.J. Rep. 37.

exploited at all by either of them, as Scelle had said.<sup>34</sup> Finally, as was often pointed out in the deliberations of the Commission, the *pactum de contrahendo* would allow one of the states involved to exert pressure upon the other and thus lead it to abandon its position. While that risk always exists in the conclusion of international treaties, it was deemed particularly harmful in respect of the delimitation of shelf boundaries.

It was for these reasons<sup>35</sup> that it was decided by the Commission and at the Conference of 1958 to lay down, in addition to the procedural provision on agreement, the substantive principle of equidistance. The crucial issue now is to define the relation between those two rules and to determine the degree to which the latter bears on the former.<sup>36</sup>

Most writers hold that the first sentences in paragraphs 1 and 2 of Article 6 have primary importance. According to them, the "general principle" is that the parties have an obligation to delimit by agreement the frontiers of their shelves; the line of equidistance referred to in the second sentence is merely a "point of departure" or an "objective criterion" to guide them in their negotiations.<sup>37</sup> These views are questionable, even though they accord with the apparent meaning of Article 6. This provision must indeed, and will in fact, be read as a whole by the parties. Three types of situations are likely to occur when two states bound by Article 6 attempt to determine the boundary separating their shelves. In the easiest case, they will both agree on the equidistance line, and no problem will arise. The second possibility is of course that neither party accepts this solution. And finally, it will frequently happen that one country is satisfied with the line of equidistance, and the other is not. In the last two hypotheses, what are the obligations of the parties under Article 6? The International Court of Justice formulated this question in its judgment, but left it unanswered.<sup>38</sup> It would seem reasonable to assert that both states have a duty to enter into negotiations and to carry them out in good faith.<sup>39</sup> That alone would raise insuperable difficulties when they do not recognize each other; and, too, the obligation to handle the matter in good faith inherently has a limited content. Certainly the parties should refrain from formulating

<sup>34</sup> See note 16 above.

<sup>35</sup> Whether these reasons were to be considered as overriding is a different question, which will be discussed in the second part of the present article. See pp. 589-590 below.

<sup>36</sup> This issue should of course be carefully distinguished from the problem which arises when one or several of the states concerned are not bound by Art. 6, par. 2, of the Continental Shelf Convention. In this case, agreement plays a more significant rôle, since no substantive rule governs the matter. See p. 588 below.

<sup>37</sup> A. Cukwurah, *The Settlement of Boundary Disputes in International Law* 7 (1967); J. Gutteridge, "The 1958 Geneva Convention on the Continental Shelf," 35 *Brit. Yr. Bk. Int. Law* 102, 120 (1959); *idem*, "The Régime of the Continental Shelf," 44 *Grotius Society Transactions* 77, 83 (1958-1959); S. Oda, "Proposals for Revising the Convention on the Continental Shelf," 7 *Col. J. Transnational Law* 1, 24 (1968); A. Shalowitz, *Shore and Sea Boundaries* 231 (1962); R. Young, "The Geneva Convention on the Continental Shelf: A First Impression," 52 *A. J. I. L.* 733, 737 (1958).

<sup>38</sup> [1969] *I.C.J. Rep.* 28.

<sup>39</sup> *Contra*, D. Padwa, "Submarine Boundaries," 9 *Int. and Comp. Law Q.* 628, 637 (1960).

extravagant claims, but under what standards could a third party (such as an arbitrator) determine whether the negotiators are acting in good faith and take reasonable positions? *Ex hypothesi* the rule of equidistance is not a relevant criterion, for if it were the landmark for the reasonableness of boundary lines in all cases, the provision in Article 6 relating to agreement would be superfluous. Furthermore, each government concerned is aware of the fact that, failing agreement, the principle of equidistance will be applied anyway. This factor is likely to have a decisive impact on most negotiations. The reference to "special circumstances" in Article 6 is not helpful to the country which attempts to avoid the application of the rule through agreement, because this term has never been defined with sufficient precision<sup>40</sup> and its opponents will usually be able to deny the applicability of the "special circumstances" clause in the particular situation. Accordingly, it is neither realistic to hope nor meaningful to provide that a settlement will be achieved, since one country will normally prefer to rely on the application of the rule which produces more satisfactory results for itself, rather than agree on a less favorable solution.

Therefore, while the parties are obliged to enter into negotiations, that requirement is restricted by the very formulation of Article 6, paragraphs 1 and 2, and does not amount to more than the customary duty which states have to take minimal diplomatic steps before a "dispute" exists, cognizable by an international court or an arbitral tribunal.<sup>41</sup> Each government concerned simply has to communicate its position to the other. As soon as the disagreement between them is patent, the principle of equidistance is automatically to be applied. Besides, the provision relating to agreement has legal value insofar as it makes clear that the principle of equidistance is not *jus cogens* and may be disregarded by the parties to the convention. But by adding the former rule to the latter, Article 6, paragraphs 1 and 2, have undermined the recently emerged customary principle that the International Court of Justice declared applicable to states which are not bound by Article 6, under which the parties have to determine their shelf boundaries by agreement according to equitable principles.<sup>42</sup>

## II. THE RULE OF EQUIDISTANCE

### A. *The Origin of the Rule*

The International Law Commission at the beginning was unable to give any general solution to the problem of the shelf boundaries.<sup>43</sup> El Khouri referred to the median line at the 1950 session, but Hudson persuasively

<sup>40</sup> See p. 582 below.

<sup>41</sup> G. Abi-Saab, *Les exceptions préliminaires dans la procédure de la Cour Internationale* 125 (1967); E. Grisel, *Les exceptions d'incompétence et d'irrecevabilité dans la procédure de la Cour Internationale de Justice* 88, 128, note 27 (1968).

<sup>42</sup> [1969] I.C.J. Rep. 47. See the dissenting opinions of Judges Morelli, at 206, and Lachs, at 220. See pp. 564 above and 588 below.

<sup>43</sup> See p. 565 above.



denied the existence of any customary principle in that respect,<sup>44</sup> and the problem was provisionally set aside.

In his Second Report on the Régime of the High Seas, François proposed that, failing agreement, the shelves of "two States separated by the sea" should be determined by a median line, and that the demarcation between the shelves "of two neighboring States . . . should be constituted by the prolongation of the line separating the territorial waters,"<sup>45</sup> that is to say by a line perpendicular to the coast at the point where the land frontier reaches the sea.<sup>46</sup> In other words, he distinguished between the situations where the countries affected had opposite or adjacent coasts. During the deliberations, the idea that the lateral boundaries should be a prolongation of the frontier line of territorial waters was supported by several members of the Commission.<sup>47</sup> But it seems that at least two of them advocated this view because they feared that, otherwise, "the continental shelf of a given country could encroach on the sea bed below the territorial waters of another country."<sup>48</sup> That argument was of course ill-founded since, as Hudson had already pointed out before, "from the legal standpoint, the continental shelf only consisted of that part thereof which lay outside territorial waters."<sup>49</sup> Other members of the Commission rejected the proposed solution on various grounds. First, Hsu remarked that it might lead to inequitable results: "The dividing line would be relatively unimportant in the case of territorial waters, which were a narrow belt, but might take on great significance and cause injustice if applied to continental shelves which were sometimes of considerable extent."<sup>50</sup> Second, Brierly "noted that there was no general rule for the delimitation of territorial waters and that, even if there were, it would not necessarily apply outside those waters."<sup>51</sup> For these reasons it was decided to provide only that the frontier should be fixed by agreement between the parties or by arbitration.

At the 1952 session, the attention of the Commission was concentrated on the boundaries of territorial waters. The special rapporteur submitted a draft Article 13, under which the frontier line between the territorial seas of two adjacent states had to be determined according to the principle of equidistance, unless a special configuration of the coast would justify a departure from the rule. This proposal, which was inspired by the writings of Whittmore Boggs,<sup>52</sup> was defended by François as the "only fair and logical solution" in many cases. He admitted that the "geometric

<sup>44</sup> [1950] I.L.C. Yearbook (I) 233, pars. 41-42.

<sup>45</sup> U.N. Doc. A/CN.4/42 at 70 (1951). See p. 586 below.

<sup>46</sup> See p. 566 above.

<sup>47</sup> [1951] I.L.C. Yearbook (I) 286, pars. 104-106, 111.

<sup>48</sup> *Ibid.*, at 288, par. 3.

<sup>49</sup> *Ibid.*, at 267, par. 19. Art. 1 of the Convention on the Continental Shelf reads: ". . . the term 'continental shelf' is used as referring (a) to the seabed and subsoil of the submarine areas adjacent to the coast but *outside the area of the territorial sea*, to a depth. . . ." (Emphasis supplied.)

<sup>50</sup> *Ibid.*, at 288, par. 4.

<sup>51</sup> *Ibid.*, at 402, par. 92.

<sup>52</sup> S. W. Boggs, "Delimitation of Seaward Areas under National Jurisdiction," 45 A.J.I.L. 240, 256 (1951).

concept was perhaps rather difficult for laymen to understand, and he himself had found it so, but he had every confidence in the expert qualifications of Mr. Whittimore Boggs."<sup>53</sup> However, other members felt that the Commission was unable to draw a general rule and therefore "should refrain from seeking to achieve the impossible."<sup>54</sup> Some of them, like Kozhevnikov and Hudson, criticized the rule of equidistance as such, which "failed to take existing practice into account" and "would not be satisfactory in a number of cases."<sup>55</sup> It was decided that the special rapporteur should consult with hydrographic experts "in order to seek clarification of certain technical aspects of the problem."<sup>53</sup>

At the end of 1952, the draft articles prepared by the Commission were submitted to all Members of the United Nations. It appeared that no uniform practice existed in respect of the boundaries of the territorial waters, and that very few governments were in favor of the application of the equidistance principle to the frontiers of the continental shelf.<sup>57</sup> But in May of 1953 François convened at The Hague a committee of experts who reached the conclusion that the rule of equidistance was the most appropriate method for drawing the boundary lines of the territorial seas. Moreover, the report of the committee remarked that they had "considered it important to find a formula for drawing the international boundaries in the territorial waters of States, which could also be used for the delimitation of the respective continental shelves. . . ."<sup>58</sup> François therefore proposed the adoption of the equidistance principle when the Commission discussed in 1953 the problem of the shelf boundaries.<sup>59</sup> The deliberations bore once more on the issue whether the frontier line of the shelf should be a prolongation of the line separating the territorial waters. The view that it should, chiefly defended by Zourek, was finally defeated by 7 votes against 2, with 4 abstentions.<sup>60</sup> François had remarked that the two matters were different, that the exceptions to the rule which were valid for the one did not necessarily apply to the other, and finally that "he saw no difficulty in using different methods for fixing boundaries of the territorial sea and of the continental shelf, since the two did not overlap, and the latter only began at the outside limit of the former."<sup>61</sup> In its 1953 Report to the General Assembly, the Commission submitted a draft Article 7 which laid down the principle of equidistance.

At its next session, the Commission adopted an Article 16 which made the rule of equidistance applicable to the boundaries between the territorial

<sup>53</sup> [1952] I.L.C. Yearbook (I) 180, par. 2.

<sup>54</sup> *Ibid.*, at 189, par. 46. See also the statements of Córdova, at 181, par. 12, and at 183, par. 32; Alfaro, at 182, par. 17; Amado, at 181, par. 11; El Khouri, at 182, par. 14.

<sup>55</sup> *Ibid.*, at 144, par. 24; at 180, par. 4.

<sup>56</sup> *Ibid.*, at 185, par. 63; [1952] I.L.C. Yearbook (II) 68, par. 39.

<sup>57</sup> U.N. Doc. A/CN.4/60 at 12 (1953); U.N. Doc. A/CN.4/71 (1953).

<sup>58</sup> U.N. Doc. A/CN.4/61/Add. Annex 7 (1953).

<sup>59</sup> See note 22 above.

<sup>60</sup> [1953] I.L.C. Yearbook (I) 134, par. 65.

<sup>61</sup> *Ibid.*, at 129, par. 55.

waters of adjacent states.<sup>62</sup> Some members of the Commission again stressed the idea that these boundaries had to be determined according to the principle laid down for the shelf frontiers, since it was necessary that the former and the latter coincide. But this view was again refuted by François.

In the final draft prepared by the Commission in 1956, Article 14 on the delimitation of territorial waters and Article 72, paragraph 2, concerning the lateral boundaries of the continental shelf, had an almost identical formulation. Both provided, first, that the boundary "shall be determined by agreement," and, second, that, in the absence of agreement, the principle of equidistance was to apply.<sup>63</sup> At the Geneva Conference, draft Article 14 was merged with Article 12; the new text was meant to prevent a state from extending its share of territorial sea by claiming a larger belt than its neighbors. Apart from that modification, the only difference between the present Article 12 of the Territorial Sea Convention and Article 6 of the Continental Shelf Convention is in the provisions relating to agreement.<sup>64</sup> Surprisingly enough, in the deliberations about each of them, the principle of equidistance raised little opposition, and no alternative solution was ever formally proposed.

The International Court of Justice rightly inferred from the preparatory work that at no time did the International Law Commission regard the principle of equidistance as "inherent in the basic concept of the continental shelf" or as customary law.<sup>65</sup> Indeed, the Court noted that the Commission, having considered various other solutions, followed the conclusions of a committee of hydrographic experts, who had been consulted chiefly on the question of the territorial waters boundaries. It was thus led to write: "In this almost impromptu, and certainly contingent manner was the principle of equidistance for the delimitation of continental shelf boundaries propounded."<sup>66</sup>

It seems that the Commission (and after it the Geneva Conference) made that decision for three reasons. A strong need was felt for a general substantive rule which would apply in the absence of agreement. Second, it appeared that, failing agreement between the states affected, the equidistance line was the only line which could be drawn automatically in all cases. Finally, the Commission found it appropriate, if perhaps not indispensable, to provide the same principle for the determination of the boundaries of the territorial waters and of the continental shelf. While the first point was not well taken, the second ground was even more questionable, as will be seen later.<sup>67</sup> As to the third reason, which was particularly emphasized during the deliberations of the Commission, it rested partly on a mistaken conception of the continental shelf, and partly on a misleading analogy drawn between the régime of the continental shelf and that of the territorial waters. On the one hand, some confusion stemmed from the fact that certain members of the Commission did not

<sup>62</sup> [1954] I.L.C. Yearbook (II) 158.

<sup>64</sup> See pp. 564-565 above.

<sup>66</sup> *Ibid.*, at 36.

<sup>63</sup> [1956] *ibid.* (II) 258, 264.

<sup>65</sup> [1969] I.C.J. Rep. 34.

<sup>67</sup> See pp. 574-575 below.

realize that the shelf, by its legal definition, consists only of the submarine areas outside the territorial sea, and that therefore the boundaries separating the territorial waters of two countries are automatically valid also for the sea bottom beneath those waters. On the other hand, the view under which the frontiers of the shelf, although distinct from the boundaries of the territorial seas, should be governed by the same principles was unfounded, for the two problems are separate. By its origin and its *ratio legis* the shelf is by no means an extension of the territorial waters. It does not serve the same purposes and is not subject to an identical legal régime.<sup>68</sup> Therefore there is no analogy which necessitates or even justifies that both have their frontiers delimited under the same rule. Moreover, from a practical point of view, the application of the principle of equidistance to the continental shelf and to the territorial waters leads to quite different results, as was pointed out by the International Court of Justice: "The distorting effects of lateral equidistance lines under certain conditions of coastal configuration are nevertheless comparatively small within the limits of territorial waters, but produce their maximum effect in the localities where the main continental shelf areas lie further out."

#### B. *The Application of the Rule*

While paragraphs 1 and 2 of Article 6 both lay down the rule of equidistance, they do not formulate it in exactly the same way. Indeed a distinction is made between two types of situations. Where the boundary line is to separate the shelves belonging to states whose coasts are *opposite* each other, the equidistance line is properly described in paragraph 1 as a "median" line, along which every point is equidistant from the nearest points on each coast. On the other hand, where the boundary line is to separate the shelves belonging to states whose coasts are *adjacent* to each other, the equidistance line should be called in paragraph 2, and was in fact named by the International Court of Justice, a "lateral" line,<sup>69</sup> along which every point is also equidistant from the nearest points on each coast. In geometric terms the "median" line runs roughly in the *middle* of the maritime areas which it divides, while the "lateral" line appears rather like a line *perpendicular* to the coasts taken into consideration. The distinction between them, however, is not merely geometric and has practical consequences which will be mentioned later.

The main difficulty arising when the principle of equidistance has to be applied relates to the determination of the "points" from which the line is to be measured. At least two solutions are conceivable: one might take

<sup>68</sup> The International Court of Justice remarked in this respect, at 38: "Equally distinct in the opinion of the Court is the case of the lateral boundary between adjacent territorial waters to be drawn on an equidistance basis."

<sup>69</sup> [1969] I.C.J. Rep. 18. A. Shalowitz, note 37 above, at 231, writes: "This distinction between an equidistant line and a median line seems valid from a geometrical point of view, for a true median line presupposes a line that is in the middle. Theoretically, at least, a boundary line through the territorial sea between two adjacent States, while an equidistant line, is not a true median line."

into account either the points along the seaward boundary line of the territorial waters of both countries concerned, or the points along their respective coastlines.<sup>70</sup> The former idea *prima facie* seems the more appropriate, since the continental shelf of each state legally starts where its territorial sea ends. Indeed its adoption was formally proposed by Pal in 1953<sup>71</sup> and defended by several members of the Commission.<sup>72</sup> But this view was persuasively opposed by François: "On the face of it, the idea was logical, but it did not allow for the crucial difficulty that no unanimity obtained regarding the breadth of territorial waters. The consequence would therefore be that, by stating a claim for a wider territorial sea, a state would be able to secure a larger extent of continental shelf. That was why his proposal to draw the boundary equidistant from the coast was fairer."<sup>73</sup> The wording he suggested was adopted at the 1953 session by 9 votes to 3, with 1 abstention,<sup>74</sup> and was not questioned any more until the 1958 Conference.

In Geneva, however, the question arose whether the points of the coastlines to be considered should be on the high or the low-water line. The British delegate defended the latter view but gave only the following argument: "While the high-water line did not move as rapidly as the low-water line, it was nevertheless liable to move, and in certain places it had moved out to seaward by several miles in the course of fifty years."<sup>75</sup> The preparatory work does not disclose any positive reason for adopting as the criterion the "points of the baselines from which the breadth of the territorial sea of each State is measured," that is to say, as a rule, the low-water line. Yet it appears that this solution was found the more suitable because it afforded a higher degree of certainty than any other one. Indeed Article 3 of the Convention on the Territorial Sea and the Contiguous Zone reads:

Except where otherwise provided in these articles, the normal baseline for measuring the breadth of the territorial sea is the low-water line along the coast as marked on large-scale charts officially recognized by the coastal State.

This provision, together with Article 4 of the same convention, related to straight baselines, purports to express the present state of customary law, as it was formulated by the International Court of Justice in the *Fisheries* case.<sup>76</sup> The reference in Article 6 to this body of rules has the advantage that the line to be considered must accord with those rules and is clearly "marked on large-scale charts." Yet it is not unlikely that it will produce frequent disputes. First, it may happen that one state bound by Article 6 is not a party to the Convention on the Territorial Sea. Since it is not

<sup>70</sup> A third possibility would be to take account of the points on the straight baselines determined under Art. 4 of the Territorial Sea Convention. But that solution would meet difficulties where no such baselines are predetermined.

<sup>71</sup> [1953] I.L.C. Yearbook (I) 125, par. 2.

<sup>72</sup> *Ibid.*, at 126, pars. 15, 17, 18.

<sup>73</sup> *Ibid.*, at 125, par. 5; at 127, par. 39.

<sup>74</sup> *Ibid.*, at 129, par. 52.

<sup>75</sup> U.N. Doc. A/Conf. 13/42 at 93, par. 2 (1958).

<sup>76</sup> [1951] I.C.J. Rep. 116.

sure that all provisions in Articles 3 and 4 of the Territorial Sea Convention are part of customary law, and therefore binding on all nations, that state might disregard those rules and, being in a position to determine more favorable baselines for its territorial sea, would thus be able to extend its share of the continental shelf available. Second, even if all countries of a particular area abide by these rules, they still allow rather flexible application. Each state will be capable of modifying the extent of its shelf depending on its more or less restrictive way of drawing its baselines, and its opponents will likewise be entitled to deny the lawfulness of its action.<sup>77</sup> The only way for all countries concerned to eliminate conflicting claims will be to reach an agreement on this issue. Therefore, in respect of the "points" to be taken into account in the application of the equidistance principle, the line will often not be measurable automatically and without any contestation; rather, the parties will have to make a settlement in order to avoid frictions.

A related question is whether the drawing of straight baselines is necessary before the lateral boundary can be delimited under the principle of equidistance. François gave it a negative answer.<sup>78</sup> But it appears that this problem cannot be solved independently from the very method which is used to compute the equidistance line. Indeed, there is not one, but at least two possible methods for this purpose; one of them seems to presuppose the existence of straight baselines, while the other does not.<sup>79</sup>

Furthermore, there is a difficulty in the application of the equidistance principle which arises out of the very formulation of Article 6, paragraphs 1 and 2. These provisions treat separately two types of situations which are not always susceptible of being distinguished from each other. When can it be said that two coasts are "opposite" or "adjacent" to each other? There are cases where the land frontier between two states reaches the sea, so that their coasts must be called "adjacent," and yet the larger parts of them are "opposite" each other in the usual meaning of the word (for instance, the coasts of Italy and Yugoslavia in the Adriatic Sea).<sup>80</sup> Since both situations have to be treated under the same principles, the problem may appear to be rather moot. Yet it could be significant in at least two respects. First, under the circumstances just described, as in the Adriatic Sea, the method suitable to determine the "lateral" boundary line might not be appropriate to delimit the "median" line; but, in such a case, where

<sup>77</sup> D. Padwa, note 39 above, at 646; R. Young, note 37 above, at 737. As Young remarks, even though, as a rule, the same method is applied to the lateral boundaries of the territorial waters and of the continental shelf, and also the same baselines are taken into account, nonetheless the two frontiers, between each of these areas, will not necessarily tie up with one another. This problem is left unresolved by Art. 6.

<sup>78</sup> [1953] I.L.C. Yearbook (I) 127, par. 33.

<sup>79</sup> S. W. Boggs, note 52 above, at 256; A. Shalowitz, note 37 above, at 231, 235, note 60; E. Menzel, "Der Deutsche Festlandsockel in der Nordsee und seine rechtliche Ordnung," 90 *Archiv des Völkerrechts* 1, 21 (1965).

<sup>80</sup> Italy and Yugoslavia concluded an agreement on Jan. 8, 1968, dividing the whole bottom of the Adriatic Sea between them. See the separate opinion of Judge Ammon in the North Sea cases, at 110.

does the former stop and the latter start? Article 6 leaves this question unanswered, since it does not define "opposite" and "adjacent" coasts. And this lack of any definition has a second consequence when two states purport to delimit their shelf boundaries by agreement. According to Article 6, they are entitled to do so only if their coasts are either "opposite" or "adjacent" to each other; otherwise any agreement between them is not opposable to third states. In the *North Sea Continental Shelf Cases*, the validity of a frontier line determined by treaty between Denmark and The Netherlands was denied by the International Court of Justice "since . . . article 6 of the Geneva Convention provides only for delimitation between 'adjacent' States, which Denmark and the Netherlands clearly are not, or between 'opposite' States which, despite suggestions to the contrary, the Court thinks they equally are not."<sup>81</sup> But the Court unfortunately did not specify the precise meaning of these two terms, and the issue is therefore still open as to when exactly two states have the right, under either paragraph 1 or 2 of Article 6, to draw the boundary line dividing their continental shelves by a settlement valid *erga omnes*.

Finally, by providing only for the separate delimitation of each different frontier between "two" adjacent states, Article 6, paragraph 2, neglects the consideration that some situations would be more appropriately treated as a whole, as is illustrated by the *North Sea Cases*. It is only the combination of the equidistance lines drawn both between Germany, on the one hand, and Denmark and The Netherlands on the other hand, which creates unsatisfactory effects for the Federal Republic. If Article 6, paragraph 2, were opposable to it, each of the two other parties would probably be entitled to insist on settling its boundary with Germany independently, thus possibly depriving it of the right to allege the existence of a "special circumstance." But since the Federal Republic is not bound by Article 6, and the parties brought their disputes jointly before the Court, this issue did not arise, and the Court was in the position to treat the two cases as one.<sup>82</sup>

### C. *The Evaluation of the Rule*

It is generally admitted that the rule of equidistance has a significant practical value. The International Court of Justice wrote in that respect: "In short, it would probably be true to say that no other method of delimitation has the same combination of practical convenience and certainty of application."<sup>83</sup> In light of the problems just referred to, it is patent that this statement should not be overvalued. While it is true that no other rule allows of an easier application, the principle of equidistance nonetheless is itself not susceptible of an automatic, uncontested application. Disputes are likely to arise in many cases on at least two issues: the determination of the baselines to be taken into account, and the choice between the different ways of fixing the equidistance line. Neither a com-

<sup>81</sup> [1969] I.C.J. Rep. 29, 36.

<sup>82</sup> *Ibid.*, at 20.

<sup>83</sup> *Ibid.*, at 24.

pulsory procedure of arbitration nor even precise legal criteria are provided for solving those questions. In the absence of agreement on them, no boundary line unilaterally drawn by one state will have to be recognized by its neighbors. Thus, the rule of equidistance does not possess the very virtue which was the main reason for its adoption: the ability to be applied directly without the participation and consent of all countries involved being necessary.

But that is not all: the rule also has inherent defects. First Cukwurah points to a character common to all geometrical types of boundaries, namely, the difficulty of describing them precisely due to the following fact:

Geometrical lines on flat maps may have very different properties from lines through points on the earth's surface. These differences arise from the fact that a curved surface is projected on to a plane. After all, the earth is neither flat like a map nor perfectly spherical like a globe. The services of a geodesist will definitely be required in order to determine the accurate position of such lines on the earth's surface.<sup>84</sup>

In respect of continental shelf boundaries there is an additional question which, despite its obvious practical significance, Article 6 leaves unanswered: Are the points along the frontier line to be computed on the bottom or on the surface of the sea?<sup>85</sup>

Second, the principle of equidistance, at least when applied to draw lateral boundary lines, can, in the words of the International Court of Justice "under certain circumstances produce results that appear on the face of them to be extraordinary, unnatural or unreasonable." Refusing to consider that principle as an essential and inherent part of the continental shelf doctrine, the Court added: "The plea that . . . the results can never be inequitable, because the equidistance principle is by definition an equitable principle of delimitation, involves a postulate that clearly begs the whole question at issue."<sup>86</sup> It went so far as to analyze the situations in which the application of the rule leads to an unfair division of the shelf. Where the coast of a state is itself concave, or where the coasts of its neighbors protrude immediately outside the land frontiers, the lateral boundaries drawn on each side will meet at a short distance from the shore, thus limiting the submarine area attributed to that state to a relatively small "triangle." The Court further noted: "In contrast to this, the effect of coastal projections, or of convex or outwardly curving coasts . . . is to cause boundary lines drawn on an equidistance basis to leave the coast on divergent courses, thus having a widening tendency on the area of continental shelf off that coast."<sup>87</sup> Illustrations of the first situation are: the German coast in the North Sea, the coast of Cameroon in the Atlantic Ocean, etc. Examples of the second type of cases are: the Tunisian coast

<sup>84</sup> A. Cukwurah, note 37 above, at 72-73.

<sup>85</sup> The line determined under the principle of equidistance is likely to be different depending on whether the points are computed on the bottom of the sea or on its surface, because the former has declivities, while the latter is plane.

<sup>86</sup> [1969] I.C.J. Rep. 25.

<sup>87</sup> *Ibid.*, at 18-19.



in the Mediterranean Sea, the coast of Gabon in the Atlantic Ocean, etc. Originally, the equidistance principle was applied to lakes, rivers, and territorial waters, that is to say, to relatively small areas, and mostly in order to delimit maritime boundaries between states whose coasts were "opposite" each other. The reason why the rule seemed appropriate in such cases was twofold: It attributed to each of the countries involved the areas which were nearest to its shores; and it divided them equally between the parties. The former element is still present, but the latter is totally absent when the rule of equidistance is applied to determine lateral boundaries; and its unequal effects are further aggravated where continental shelf frontiers have to be drawn, because the areas to be divided are larger.<sup>88</sup>

So far as lateral boundaries are concerned, the principle of equidistance is thus based on a sole idea, namely, that of proximity, leaving aside all the other factors which would appear relevant under the doctrine of the continental shelf: the equitable apportionment of the shelf between the states concerned, notably according to the length of their respective coastlines; the attribution to each country of the areas which must be regarded as the natural prolongation of their mainland.

### III. THE CLAUSE RELATING TO SPECIAL CIRCUMSTANCES

Paragraph 2 of Article 6 of the convention, like paragraph 1, subjects the application of the rule of equidistance to the fulfillment of two conditions: the method is to be used only "in the absence of agreement" (as has been mentioned), and also "unless another boundary line is justified by special circumstances." The International Court of Justice pointed in its judgment to "the part played by the notion of special circumstances relative to the principle of equidistance as embodied in Article 6, and the very considerable, still unresolved controversies as to the exact meaning and scope of this notion."<sup>89</sup> But, since the Court did not have to apply the concept of "special circumstances" in the *North Sea Cases*, it did not purport to determine expressly the degree of flexibility which the proviso brings to the principle of equidistance.

When legal writers and the International Law Commission first attempted to lay down a rule for the delimitation of shelf boundaries, they were aware of the fact that no principle would ever be appropriate for all cases and that some provision had therefore to be made for certain situations requiring special treatment.<sup>90</sup> At the session of 1951 the members of the Commission were so conscious of the difficulty of setting forth a general rule that they renounced formulating any.<sup>91</sup> In 1952 the Commission's work focused on the question of territorial sea boundaries, and again did not result in the formulation of any principle. In the course of the discussion, Hudson had remarked: "Where there were islands or archipelagoes in the vicinity of the point where the frontier reached the sea, as in the

<sup>88</sup> *Ibid.*, at 37-38.

<sup>90</sup> F. Vallat, note 7 above, at 336.

<sup>89</sup> *Ibid.*, at 43.

<sup>91</sup> See pp. 565-566 above.

case of the Passamaquoddy Bay, he did not think that any principle could be laid down. . . ."<sup>92</sup> And Chairman Alfaro pointed out the diversity of the geographic situations which may present themselves: the frontier can end on either a concave or a convex indentation of the coast; in the former case, there is no difficulty about applying the rule of the median line, while in the latter, the rule appears to be meaningless.<sup>93</sup>

At the session of 1953, when François first formally suggested the adoption of the equidistance principle, he did not mention "special circumstances."<sup>94</sup> But he later added to his proposal the words "as a rule," noting that, since frontier disputes had to be solved by arbitration under the Commission's draft, an escape clause was necessary in order to enable the arbitrators to take all circumstances of the particular case into account; otherwise they would always simply have to apply the rule, and their rôle would be rather meaningless.<sup>95</sup> Spiropoulos suggested the wording: "unless another boundary line is justified by special circumstances." But other members of the Commission felt that such a proviso "deprived the text of its juridical significance." The strongest objections were raised by Lauterpacht, who was afraid that judges or arbitrators would find it difficult to interpret the words "special circumstances." He thought that the Commission should specify the exceptions it had in mind rather than adopt a vague clause.<sup>96</sup> However, François' proposal was adopted by 8 votes to 5.

In the final draft prepared by the International Law Commission in 1956, the same formula was found in Article 14 (delimitation of the territorial sea of two adjacent states) and in Article 72 (determination of the shelf boundaries). The comment to the former provision noted that "the rule should be very flexibly applied,"<sup>97</sup> and the comment to the latter pointed out that "the rule adopted is fairly elastic."<sup>98</sup> Draft Article 14 was modified at the Geneva Conference, and the "escape clause" in the present Article 12 of the Convention on the Territorial Sea reads:

The provisions of this paragraph shall not apply, however, where it is necessary by reason of historic title or other special circumstances to delimit the territorial seas of the two States in a way which is at variance with this provision.

The proviso relating to "historic title," which was adopted by 25 votes to 13, with 31 abstentions, and that concerning "other special circumstances," accepted by 38 votes to 7, with 22 abstentions, met with some opposition, notably on the part of Yugoslavia, Portugal and Greece.<sup>99</sup> As to Article 72, the discussion in the Fourth Committee focused on the "special circumstances" clause rather than on the rule of equidistance itself. The delegate of Yugoslavia suggested deleting the proviso, which he described as "both

<sup>92</sup> [1952] I.L.C. Yearbook (I) 181, par. 7.

<sup>93</sup> *Ibid.*, at 182, par. 17.

<sup>94</sup> See note 22 above.

<sup>95</sup> [1953] I.L.C. Yearbook (I) 130, par. 3; 131, par. 14.

<sup>96</sup> *Ibid.*, at 131, pars. 10, 15-17; at 132, par. 23.

<sup>97</sup> [1956] I.L.C. Yearbook (II) 272, par. 7.

<sup>98</sup> *Ibid.*, at 300, par. 1.

<sup>99</sup> U.N. Doc. A/Conf. 13/39 at 187, pars. 8, 12; at 189, par. 35 (1958).

vague and arbitrary, and likely to give rise to misunderstanding and disagreement.”<sup>100</sup> However, most delegations defended the Commission’s text. The delegate of Venezuela found it “not possible to provide a general rule to cover all cases,” and that of Tunisia felt that the “delimitation . . . should take account of the geographical configuration of the region, and that considerable flexibility would have to be used in applying that article.”<sup>101</sup> But when the present wording was finally accepted by the Fourth Committee, F. Münch declared on behalf of the Federal Republic of Germany that it “had accepted the views of the majority of the Committee, subject to an interpretation of the words ‘special circumstances’ as meaning that any exceptional delimitation of territorial waters would affect the delimitation of the continental shelf.”<sup>102</sup> And the delegate of Indonesia added: “The International Law Commission’s text was sufficiently flexible to provide all States, whatever their geographical situation, with the necessary safeguards.”<sup>103</sup>

Clearly, this proviso was adopted because the framers of the convention felt that the application of the equidistance principle would not be satisfactory in all cases and that exceptions to the rule should therefore be provided. But the preparatory work gives little information upon the content of the concept of “special circumstances,” the definition of which is absent in Article 6. Two extreme interpretations of the notion are conceivable. One accords with the *ratio legis* just mentioned: a special circumstance may be said to exist in any case where the equidistance line has inappropriate effects. The other relies rather on the formulation of Article 6: since the “circumstances” must be “special” and “justify” a departure from the principle, in order to be taken into account, they may be regarded as present only in quite exceptional situations, where the drawing of an equidistance line would be unfeasible. It would be wrong to think that the former reading sets forth a subjective criterion, and the latter an objective standard. Actually, subjective and objective considerations are not distinguishable in such matters: While the physical factors in each case are of course part of the objective reality, their appreciation by the states concerned (for instance, in the course of negotiations), or even by arbitrators, will by definition be subjective.

In the *North Sea Cases*, where the Federal Republic subsidiarily contended that the principle of equidistance had to be disregarded because of the presence of “special circumstances,” Denmark and The Netherlands expressed a very narrow view of the notion which was thus summarized by the Court:

. . . the configuration of the German North Sea coast, its recessive character, and the fact that it makes nearly a right-angled bend in mid-course, would not of itself constitute, for either of the two boundary lines concerned, a special circumstance . . . : only the presence of some special feature, minor in itself—such as an islet or small pro-

<sup>100</sup> U.N. Doc. A/Conf. 13/42 at 91, par. 4 (1958).

<sup>101</sup> *Ibid.*, at 21, par. 29; at 22, par. 35. <sup>102</sup> *Ibid.*, at 98, par. 38.

<sup>103</sup> *Ibid.*, par. 39. See U.N. Doc. A/Conf. 13/38 at 15, par. 6 (1958).

tubercance—but so placed as to produce a disproportionately distorting effect on an otherwise acceptable boundary line would, so it was claimed, possess this character.<sup>104</sup>

The Court did not expressly pronounce upon this issue. Yet its opinion warrants at least by implication a broad construction of the “escape clause.” As has been mentioned, the Court ruled that the delimitation of shelf boundaries had always been, and ought to be made according to “equitable principles.”<sup>105</sup> Moreover, under the judgment, “the exception in favor of ‘special circumstances’” was introduced in pursuance of the belief that the determination of the boundaries “should be effected on equitable principles.”<sup>106</sup> In other words, the Court thought that the “escape clause” had been appended to the rule of equidistance in order to remedy the inequitable effects which the rule might produce in some cases. Therefore, in the Court’s view, the valid test to establish whether a “special circumstance” exists in a particular case is whether the application of the equidistance principle leads to inequitable results in the concrete situation. Of course, this standard implies a broad construction of the “escape clause,” which is also defended by some writers.<sup>107</sup>

A criterion which relates solely to “equity” is vague as well as broad. Since the notion of special circumstances has considerable significance, an attempt must be made to determine its content more precisely by examining all concrete factors which might be taken into account. The comment of the International Law Commission to the draft articles submitted in 1953 may serve as a basis for that study.<sup>108</sup> It refers to two essential features. It first speaks of “any exceptional configuration of the coast.” This formula is obviously obscure: there are not two identical shores on the globe, and it therefore is hard to establish what is the rule and what is the exception in that matter. But it is clear that not only coasts of a quite particular kind, like archipelagos or deltas, ought to be taken into consideration, but that the phrase includes also situations such as that of the North Sea, where the German coastline merely forms a concave indentation. Indeed the International Court of Justice specified that the application of the equidistance principle in the *North Sea Cases* would be inequitable.<sup>109</sup> Thus, under the standard referred to earlier, a special circumstance was present and would certainly have justified a departure from the

<sup>104</sup> [1969] I.C.J. Rep. 21.

<sup>105</sup> *Ibid.*, at 37, 47.

<sup>106</sup> Most of the judges who wrote individual opinions were in disagreement on the question as to whether the “special circumstances” clause merely appends an *exception* to the rule or rather is an “alternative of *equal rank*.” For the former view, see the dissenting opinions of Judges Tanaka, at 187, Lachs, at 221, 239, and Sørensen, at 254. For the latter construction, see the separate opinion of Judge Padilla Nervo, at 93, and the dissenting opinion of Judge Morelli, at 207, 209.

<sup>107</sup> J. Gutteridge, note 37 above, at 120; S. Oda, note 37 above, at 25; G. Scelle, “Plateau continental et droit international,” 59 *Revue Générale de Droit International Public* 6, 17 (1955).

<sup>108</sup> [1953] I.L.C. Yearbook (II) 216, par. 82.

<sup>109</sup> [1969] I.C.J. Rep. 50.

equidistance line, had Article 6, paragraph 2, been applicable in these cases.<sup>110</sup>

The comment mentions in the second place "the presence of islands or of navigable channels." The latter element does not seem to have much relevance because, according to Article 3 of the convention, the exercise by one state of its sovereign rights over the continental shelf must not encroach upon the freedom of navigation enjoyed by all other states. The former, on the contrary, has great practical importance. Under Article 1 of the convention, the "submarine areas adjacent to the coasts of islands" are covered by the term "continental shelf" and appertain to the sovereign of the respective islands. Therefore these do not, as such, constitute "special circumstances." However, if the equidistance principle is applied strictly in a case where an island belonging to one state is situated near the coast of another state, the latter's share of the continental shelf will be considerably reduced.<sup>111</sup> The result will thus often be obviously inequitable. At the Geneva Conference Commander Kennedy declared in that respect: "For the purposes of drawing a boundary, islands should be treated on their merits, very small islands or sand banks being considered as having no continental shelf but only an appropriate territorial sea."<sup>112</sup> Again, the criterion proposed is uncertain.<sup>113</sup> Attempts have been made by scholars to lay down more precise rules<sup>114</sup> but, advisable as they may be *de lege ferenda*, they have no foundation *de lege lata*. Furthermore, one might think of other factors which could be considered as "special circumstances": for instance, the presence of valuable resources in some parts of the shelf to be divided, and their absence in others;<sup>115</sup> but here also it would hardly be possible to set forth any principle. It should finally be noted that "historic title" is irrelevant to continental shelf boundaries, whereas it is expressly referred to in Article 12 of the Convention on the Territorial Sea.

Thus, the "special circumstances" clause covers a wide range of situations where the application of the equidistance principle would lead to inequitable results. It is therefore likely to have the following consequences: In almost every case, the country which does not find the equidistance line satisfactory will be entitled to allege that a departure from the rule is justified. There will then be only two ways to avoid conflicting claims. Either the parties reach an agreement on the delimitation of the boundary line or they submit their dispute to arbitration. Since no definite criteria

<sup>110</sup> Judge Padilla Nervo specified in his separate opinion, at 91: "It appears . . . that the case of the North Sea . . . could be deemed a case in which special circumstances exist." Judges Morelli, at 210, and Ammoun, at 151, reached the same conclusion.

<sup>111</sup> S. Oda, note 37 above, at 27.

<sup>112</sup> U.N. Doc. A/Conf. 13/42 at 92, par. 3 (1958).

<sup>113</sup> S. W. Boggs, *International Boundaries* 181 (1940); J. Gutteridge, note 37 above, at 120; S. Jones, *Boundary-Making* 140 (1945); S. Oda, note 37 above, at 28.

<sup>114</sup> S. W. Boggs, note 52 above, at 257; D. Padwa, note 39 above, at 647.

<sup>115</sup> This factor was taken into account in the *Grisbadarna* case. Award of the Permanent Court of Arbitration of Oct. 23, 1909, XI Int. Arb. Awards 147, 161.

apply in the matter, except the test of "equity" laid down by the International Court of Justice, the arbitrators will be in a position to adjudicate *ex aequo et bono*.

THE RULES APPLICABLE TO THE STATES WHICH ARE NOT PARTIES TO THE  
CONVENTION ON THE CONTINENTAL SHELF

I. PRELIMINARY REMARK

The rules embodied in Article 6, paragraph 2, of the 1958 Convention often are not applicable because one or several of the states concerned are not bound by this provision. Such was the situation in the *North Sea Cases*, and the problems to which it gives rise were dealt with by the International Court of Justice. But, before turning to a study of its judgment, it will be useful to point to other solutions which had been suggested before 1958. These various proposals significantly differ from the Court's opinion and may be regarded as relevant only *de lege ferenda*. But the former as well as the latter are susceptible to serve as points of reference if Article 6, paragraph 2, is ever revised.

The methods of determining lateral shelf boundaries may be divided into two categories. In order to make the distinction between them clear, it must be noted that the problem under consideration consists of two elements: the drawing of a boundary line, and the division of a given area between two neighboring sovereigns. Those two features are of course inseparable in the sense that, as soon as one of them is established, the other follows almost by necessity. Yet they are not identical, and the question is asked as to which must be considered as primary, and which as secondary. Thus, two possibilities exist, each of which corresponds to a different methodology: either the partition of a certain submarine area between two states is taken as the starting point; it will result in a division, for example half and half, and the frontier line will then be drawn accordingly; or the delimitation of the boundary line is regarded as the primary issue; a device will be found to compute the line, which will automatically produce the attribution to each state of the shelf available.

II. VARIOUS METHODS OF DELIMITING THE LATERAL BOUNDARIES OF THE  
SHELF

A. *Methods Which Take the Division of the Shelf as the Starting Point*

Since scholars have tackled the problem of the partition of the shelf, numerous solutions have been proposed. Some writers, like Azcárraga and Sturm, imagined formulas in order to determine the *breadth* of the submarine areas attributed to each country, the sea bottom lying seaward of the limit thus fixed remaining subject to the freedom of the seas.<sup>116</sup> On his part, Menzel mentions no less than four different devices through which a continental shelf, such as that of the North Sea, could be divided

<sup>116</sup> J. de Azcárraga y de Bustamante, *La plataforma submarina y el derecho internacional* 82 (1952); E. Sturm, *Das Kontinentalschelf* 141 (1957).

between the riparian nations.<sup>117</sup> In short, all these methods purport to produce an equitable partition by taking a greater or lesser number of factors into account, like the lengths of the coastlines, the density of the population in each state concerned, the economical value of the resources found on the seabed and its subsoil, etc. They need not be analyzed here in detail, since the International Court of Justice has denied them any value in positive law. In the *North Sea Cases*, Germany claimed a "just and equitable share" of the available continental shelf, in proportion to the length of its coastline or sea-frontage."<sup>118</sup> The Federal Republic argued that, in the absence of agreement and when Article 6 was not applicable, international law called for an "equitable apportionment" of the sea bottom. The Court firmly rejected these contentions "at least in the particular form they have taken." It first made the distinction referred to earlier:

Delimitation is a process which involves establishing the boundaries of an area already, in principle, appertaining to the coastal State and not the determination *de novo* of such an area. Delimitation in an equitable manner is one thing, but not the same thing as awarding a just and equitable share of a previously undelimited area. . . .<sup>119</sup>

It then wrote:

. . . the doctrine of the just and equitable share appears to be wholly at variance with . . . the most fundamental of all the rules of law relating to the continental shelf . . . namely that the rights of the coastal State in respect of the area of continental shelf that constitutes a natural prolongation of its land territory into and under the sea exist *ipso facto* and *ab initio*, by virtue of its sovereignty over the land. . . . In short, there is here an inherent right. . . .

It follows that even in such a situation as that of the North Sea, the notion of apportioning an as yet undelimited area, considered as a whole (which underlies the doctrine of the just and equitable share), is quite foreign to, and inconsistent with, the basic concept of continental shelf entitlement, according to which the process of delimitation is essentially one of drawing a boundary line between areas which already appertain to one or other of the States affected. . . .<sup>120</sup>

The grounds on which the Court relied appear to be rather theoretical and, as such, quite unpersuasive. The doctrine of the continental shelf was created in order to attribute to individual states exclusive rights over areas which were theretofore unoccupied. It thus entailed the *division* of the continental shelf between the different sovereigns just as much as it made the drawing of boundaries necessary. By simply excluding the former element from its consideration, the Court was begging the question and even artificially obscuring the main issue—the actual partition of the shelf—with the delimitation of the boundaries being merely a technical problem.<sup>121</sup> However, there were good reasons, not of a dogmatic but of a

<sup>117</sup> E. Menzel, note 79 above, at 23.

<sup>118</sup> [1969] I.C.J. Rep. 21.

<sup>119</sup> *Ibid.*, at 23.

<sup>120</sup> *Ibid.*

<sup>121</sup> The Court was not aware of this, since it wrote, at 23: "Evidently any dispute about boundaries must involve that there is a disputed marginal or fringe area, to which both parties are laying claim, so that any delimitation of it which does not

practical nature, why the German position as well as the various methods mentioned earlier had to be rejected. The fact is that none of the formulas which have been proposed so far is sufficiently comprehensive and consistent to be satisfactory in most cases and to be adopted as a rule of law. It seems probable that, due to the complexity of the matter, all devices which can be imagined in order to divide the shelf between adjacent states are bound to be more or less arbitrary. The Court should therefore be approved for not accepting a methodology that recommends itself only for doctrinal reasons, and the application of which is not capable of producing generally appropriate results. Furthermore, it is unlikely that methods taking the partition of the shelf as a starting point will play an important rôle in the foreseeable future.

*B. Methods Which Take the Drawing of the Boundary Lines as the Starting Point*

Various rules have been imagined, under which lateral boundary lines of the shelf can be delimited. Of course, the principle of equidistance is one of them. But at least two others are worth mentioning.

First, it has been proposed to draw a line perpendicular to the shore. That in fact involves two different possibilities. The line could be perpendicular either to the coast "at the point where the land boundary meets the sea" or to the "general direction of the coastline." The former solution was contained in a draft article submitted by François to the International Law Commission in 1951; but it was soon abandoned and did not play an important rôle in the preparatory work to Article 6, paragraph 2, of the 1958 Convention.<sup>122</sup> The latter was first applied in the *Grisbadarna* case to territorial waters boundaries;<sup>123</sup> it was often referred to during the deliberations of the Commission, and the governments of Belgium, Norway and Sweden recommended its adoption in their comments to the draft articles of 1952. But the committee of experts convened at The Hague in 1953 "agreed that it was often impracticable to establish any 'general direction of the coast' and the result would depend on the scale of the chart used for the purpose and . . . how much coast shall be utilized in attempting to determine any general direction whatever. . . ." <sup>124</sup>

It is fortunate for several reasons that neither of these two solutions was embodied in Article 6, paragraph 2, or envisioned as applicable by the International Court of Justice in the *North Sea Cases*. First, it is misleading to speak of a line "perpendicular" to the coast, for that word can only be properly used if the shore is straight at the point at which the land frontier reaches the sea. If the coast is concave, the boundary line should be called

---

leave it wholly to one of the parties will in practice divide it between them in certain shares, or operate as if such a division had been made. But this does not mean that there has been an apportionment of something that previously consisted of an integral, still less an undivided whole."

<sup>122</sup> See p. 571 above.

<sup>123</sup> *Grisbadarna* case, note 115 above, at 160; see also 4 A.J.I.L. 226 (1910).

<sup>124</sup> U.N. Doc. A/CN.4/61/Add.1 Annex 7 (1953).



a "bisector" or a "diagonal"; if it forms a convex indentation, the idea of a "perpendicular" line is evidently inapplicable. Also, while the first method is susceptible of an easy application (a tangent is drawn where the land boundary meets the sea, and the frontier line is delimited perpendicular to that tangent), it would often lead to unacceptable results. As the International Law Commission pointed out: "If the coastline curves in the vicinity of the intersection . . . the line drawn at right angles might meet the coast at another point." Finally, the second method would have a large degree of uncertainty as to what exact portion of the coast should be taken into account to compute the boundary line, and the rule would thus be fairly imprecise. Therefore, the Commission decided in 1954 that this method is "too vague for the purposes of the law."<sup>125</sup>

In the second place, it has been suggested that the lateral shelf boundaries be determined by extending the land frontier lines. That again would entail two different methods, for one could take into account either the frontier line "at the point where it reaches the sea" or the "general frontier line" separating the two countries concerned. Hudson advocated the latter solution,<sup>126</sup> but it was found inappropriate, since it is evidently too vague to form the basis of a legal principle. As to the former method, it played an insignificant part in the preparatory work of Article 6, paragraph 2, because its application would produce unacceptable effects in many cases.

None of these proposals, which purport to lay down a general rule applicable when the parties are unable to reach an agreement, achieves its goal in an appropriate way. Indeed the criteria suggested, which are even less precise and give rise to even more debatable issues than the principle of equidistance itself, would not be susceptible of an automatic application without the participation and consent of all states concerned being necessary. They would therefore be incapable of supplementing the lack of a settlement between the parties on the determination of lateral boundaries.

### III. THE RULES LAID DOWN BY THE INTERNATIONAL COURT OF JUSTICE IN THE NORTH SEA CONTINENTAL SHELF CASES

In the *North Sea Cases*, the International Court of Justice had to declare what rules are applicable in situations where one of the states concerned has not ratified the Convention on the Continental Shelf and is not otherwise bound by Article 6, paragraph 2, as such. It first examined whether the equidistance principle is inherent in the doctrine of the continental shelf. Denmark and The Netherlands contended that the test to determine the appurtenance of a certain area to one particular state must necessarily be the "proximity" of that area to that state. The Court denied that the notion of "proximity" is an essential part of the law of the continental shelf, and wrote: "Even if proximity may afford one of the tests to be applied and an important one in the right conditions, it may not necessarily be the only, nor in all circumstances, the most appropriate one." It thought that the appurtenance of the shelf relied on a more fundamental

<sup>125</sup> [1954] I.L.C. Yearbook (II) 158.

<sup>126</sup> [1952] *ibid.* (I) 181, pars. 7-8.

basis, namely, on the fact that "the submarine areas concerned may be deemed to be actually part of the territory over which the coastal State already has dominion,—in the sense that, although covered with water, they are a prolongation or continuation of that territory, an extension of it under the sea."<sup>127</sup> According to the Court, the "prolongation" principle is not to be identified with the concept of proximity or of equidistance; on the other hand, it does not imply a notion of "just and equitable share." Thus the Court refused to regard the rule of equidistance as an "inescapable *a priori* accompaniment of basic continental shelf doctrine," and added:

It is said not to be possible to maintain that there is a law ascribing certain areas to a State as a matter of inherent and original right . . . without also admitting the existence of some rule by which those areas can be obligatorily delimited. The Court cannot accept the logic of this view. The problem arises only where there is a dispute and only in respect of the marginal areas involved. . . .

Moreover, it found that its conclusion was strengthened by the origin of the notion of equidistance and the preparatory work to Article 6. Indeed, since the Truman Proclamation of 1945, "two concepts, of delimitation by mutual agreement and delimitation in accordance with equitable principles, have underlain all the subsequent history of the subject."<sup>128</sup> The Court found it legitimate to suppose that the rule of equidistance had been proposed and finally adopted for reasons "not of legal theory but of practical convenience."<sup>129</sup> The majority of the judges further held that the rule has not as yet become part of customary international law and that it is therefore not binding in a case where one of the parties has not ratified the Convention on the Continental Shelf.

The Court continued by formulating the rules of law which it deemed applicable in this situation. It specified in that respect: "The Court will discharge this task in such a way as to provide the Parties with the requisite directions, without substituting itself for them by means of a detailed indication of the methods to be followed and the factors to be taken into account." Accordingly, it declared that three basic principles have to be observed by the parties. In the first place, the states concerned are obliged "to enter into negotiations with a view to arriving at an agreement."<sup>130</sup> In the Court's opinion, this duty arises out of the customary rules relating to the continental shelf and "merely constitutes a special application of a principle which underlies all international relations, and which is moreover recognized in Article 33 of the Charter of the United Nations as one of the methods for the peaceful settlement of international disputes." The parties are under the obligation not to consider the negotiations as a mere "formal process," and are bound "so to conduct themselves that the negotiations are meaningful, which will not be the case when either of them insists upon its own position without contemplating any modification of it."<sup>131</sup> Second, the Court ruled that the agreement should

<sup>127</sup> [1969] I.C.J. Rep. 31–32.

<sup>128</sup> *Ibid.*, at 36.

<sup>129</sup> *Ibid.*

<sup>128</sup> *Ibid.*, at 33–34.

<sup>130</sup> *Ibid.*, at 48.

be arrived at by taking all the circumstances of the case into account, and should conform with "equitable principles." In order to achieve this purpose, the parties may use various methods, including the equidistance line, "provided that . . . a reasonable result is arrived at." The Court specified that the drawing of the equidistance line in a case such as that of the North Sea "leads unquestionably to inequity." Yet it also added that "equity does not necessarily imply equality," and that the proper method should not remedy natural inequalities, but rather take all the circumstances of the particular situation into consideration: "It is therefore not a question of totally refashioning geography whatever the facts of the situation but, given a geographical situation of quasi-equality as between a number of States, of abating the effects of an incidental special feature from which an unjustifiable difference of treatment could result."<sup>132</sup> Finally, the Court enumerated a number of factors which should be taken into account in order to reach equitable results. These criteria include geographical aspects (the configuration of the coasts of the parties), geological elements (the natural features of the shelf itself), the idea that certain resources available on the sea bottom constitute a unity which would be exploited most efficiently as a whole,<sup>133</sup> and also the notion that a certain degree of proportionality should be respected in the delimitation of lateral boundaries, according particularly to the lengths of the respective coastlines of all states concerned.

#### IV. CONCLUSION

An analysis of the alternatives which were open to the International Court of Justice and of the choices which it deemed appropriate to make will serve as a conclusion. The Court expressed the two basic ideas which must be regarded as governing the whole matter of the lateral boundaries of the continental shelf. First, the boundary lines have to be delimited according to "equitable principles." Second, the determination of these frontiers must result in attributing to each state the submarine areas which constitute the "natural prolongation" of its land territory. Of course, these two principles are closely related to each other and could hardly be distinguished. They not only are consistent with the history and *ratio legis* of the doctrine of the continental shelf, but indeed form the fundamental features in the allotment to individual states of sovereign rights over the seabed and its subsoil. Yet they do not as such provide any practical method for the drawing of boundary lines. They are somewhat question-begging and in fact leave open the two issues which will arise in each case: Where does the "most equitable" frontier line lie, and what are the areas which "appertain" to each of the countries concerned? In other words, the two basic ideas formulate the goal to be achieved rather than the means to reach it.

<sup>132</sup> *Ibid.*, at 50-51.

<sup>133</sup> This point is particularly emphasized in the separate opinion of Judge Jessup, at 83-84.

Thus the Court was faced with a further problem: What is the method most suitable to accomplish the envisioned aim? Two main alternatives presented themselves to the Court, which could either declare what substantive rules are applicable, or content itself with designating the procedures through which the aim ought to be accomplished. The judgment first examined the former possibility and rejected it by denying the applicability of both Article 6, paragraph 2, of the Continental Shelf Convention and the rule of equidistance. Since Article 6, paragraph 2, was not as such applicable in the *North Sea Cases*, the Court did not have to express itself on whether this provision is capable of producing "equitable" effects. But the judgment clearly stated that the drawing of the equidistance line would often be inequitable.<sup>134</sup> From this it may be inferred that, in the Court's view, the application of Article 6, paragraph 2, might also lead to inequitable results in many cases, unless recourse is made to the provision relating to "special circumstances." But that is not all. It should be remembered that the "escape clause" must be broadly construed, and that the test used by the Court to determine its applicability in a particular case is whether the equidistance line is "equitable" or not. Article 6, paragraph 2, at least as interpreted by the Court, thus creates a vicious circle: whereas it sets forth the rule of equidistance as the most equitable solution to the problem, at the same time it provides that the principle will not be applied when the equidistance line would lead to an inequitable result! It was therefore appropriate for the Court to hold that neither the equidistance principle alone, nor Article 6, paragraph 2, as a whole, were valuable substantive rules which ought to be applied in situations where all parties have not ratified the Convention on the Continental Shelf. The Court further declared—with good reason—that there existed no other rule which was of a more suitable application than the rule of equidistance.<sup>135</sup> Accordingly, it ruled, at least by implication, that no substantive principle applies when all states involved are not bound by Article 6, paragraph 2, of the 1958 Convention.

This conclusion, however unfortunate it may appear to some,<sup>136</sup> must be firmly approved. There are several reasons why the determination of lateral boundaries on the shelf is not a justiciable question, in the sense that no legal rule is capable of resolving it. First, the matter is of a considerable complexity. It embraces situations of quite different kinds. The geographical and geological factors vary so greatly from one case to another, that one single general principle could hardly take all the possible circumstances into account and always lead to satisfactory results. In fact, no such rule has been discovered as yet. Also, the subject is relatively new. Continental shelf boundaries have been a crucial issue for only a few years. The practice is still sparse and, as the Court noted, far from being uniform.<sup>137</sup> It may be that a new principle will emerge in the

<sup>134</sup> See p. 582 above.

<sup>135</sup> See p. 577 above.

<sup>136</sup> See the dissenting opinions of Judges Morelli, at 201, 215; Tanaka, at 196; Sørensen, at 250, 257. S. Oda, note 37 above, at 25.

<sup>137</sup> [1969] I.C.J. Rep. 45.

future out of more numerous and more conclusive precedents. But it would be premature to lay down a substantive rule now. *A fortiori* it was premature in 1958. The purpose of Article 6, paragraph 2, was to set forth legal principles which would be susceptible of general application either directly by the parties or by an arbitral tribunal. As has been shown, this provision entirely missed its goal. The first sentence of paragraph 2, relating to agreement, is deprived of its meaning by the second sentence, which lays down the rule of equidistance. The substance of this rule is in turn undermined by the "special circumstances" clause.<sup>138</sup> This result is not surprising, since the question was not ripe in 1958 and is not as yet ready to be resolved by material legal principles.

It does not seem that this conclusion should be regarded as running counter to the interests of the international community, which has only two concerns here: that the boundary line be equitable, and that a solution be reached by peaceful means in each case.<sup>139</sup> These interests are not so strong, as compared with those of each individual state, that they require a substantive regulation of the matter. The problem of the lateral boundaries on the shelf may therefore be left materially unresolved by international law. However, the community of nations is clearly interested in defining certain procedures through which its goal—*i.e.* the peaceful delimitation of equitable frontier lines—will most suitably be achieved.<sup>140</sup> Two main possibilities are open in this respect.

In the first place, it could be provided—as was in fact in the early drafts of the International Law Commission—<sup>141</sup> that the boundary lines will be determined by arbitration. But this solution gives rise to a fundamental objection: since no general substantive rule exists on the matter, the arbitrators would be granted a wide discretionary power, practically the competence to adjudicate *ex aequo et bono*. Therefore, it would be inappropriate to oblige the states to resort to the arbitral procedure. Of course, they will always be free to do so. But most nations will probably be reluctant to take this step, because they regard the issue as too significant to be decided by an arbitral tribunal on an equitable basis.

For these reasons, the International Court of Justice chose the second alternative, namely, to declare that the states concerned must reach an agreement on their shelf boundaries. But the Court also supplied the parties with guidelines to serve them as "starting points" for their negotiations. Thus, it enumerated a number of factors which ought to be taken

<sup>138</sup> See pp. 566, 570, 583 above.

<sup>139</sup> Judge Ammoun notes in his separate opinion, at 133, that there is a lacuna in international law which, according to him, has to be filled by a recourse to the principle of equity.

<sup>140</sup> The Court wrote in this respect, at 51: "As the operation of delimiting is a matter of determining areas appertaining to different jurisdictions, it is a truism to say that the determination must be equitable; rather is the problem above all one of defining the means whereby the delimitation can be carried out in such a way as to be recognized as equitable."

<sup>141</sup> See p. 566 above.

into consideration in drawing lateral boundary lines: ". . . *it being understood that the parties will be free to agree upon one method rather than another, or different methods if they so prefer.*" (Emphasis supplied.) And the Court added:

In fact, there is no legal limit to the considerations which States may take account of for the purpose of making sure that they apply equitable procedures, and more often than not it is the balancing-up of all such considerations that will produce this result rather than reliance on one to the exclusion of all others. The problem of the relative weight to be accorded to different considerations naturally varies with the circumstances of the case.<sup>142</sup>

It is therefore clear that the Court only laid down the principle of agreement and did not intend to set forth any substantive rule.<sup>143</sup> The states concerned will always be entitled to agree on whatever frontier line they wish. The sole limitations in that regard arise out of the general rules of international law relating to the conclusion of bilateral treaties. It will be assumed that any settlement reached is in accordance with "equitable principles." And the party which denies subsequently the validity of an agreement will bear the burden of showing, for instance, that undue pressure was exercised or that the circumstances have changed.

The defects of the solution chosen by the Court are obvious. Some of them have been pointed out earlier.<sup>144</sup> In certain parts of the world the governments of neighboring states do not recognize each other and will be reluctant even to enter into negotiations. Also, it will be extremely hard, and sometimes impossible, to arrive at a settlement. What is the legal situation when two parties are incapable of agreeing on a boundary line, that is to say, when the areas claimed by each of them overlap? The Court held that these areas "are to be divided between them in agreed proportions or, failing agreement, equally, unless they decide on a régime of joint jurisdiction, user, or exploitation for the zones of overlap or any part of them."<sup>145</sup> It apparently follows that, under the Court's view, failing agreement, the disputed area must be divided in equal proportions between the countries involved. On the face of it, this idea is equitable. Yet it is obscure and does not rely on any basis in positive law. Its legal value is therefore dubious.<sup>146</sup> It might have been preferable for the Court simply to formulate what appears to be the most logical consequence of a lack of agreement: none of the nations concerned is entitled to exercise

<sup>142</sup> [1969] I.C.J. Rep. 51.

<sup>143</sup> Judge Koretsky notes in his dissenting opinion, at 168, that the "factors" enumerated by the Court are not principles of law, but, "rather, economico-political in nature." See the dissenting opinion of Judge Morelli, at 215-216.

<sup>144</sup> See p. 568 above.

<sup>145</sup> [1969] I.C.J. Rep. 54.

<sup>146</sup> Judge Koretsky remarks in his dissenting opinion, at 168, that this idea is contrary to the previous holding of the Court under which "its task in the present proceedings relates essentially to the delimitation and not the apportionment of the areas concerned or their division into converging factors." See [1969] I.C.J. Rep. 23.

any right over areas which are also claimed by one or several of its neighbors.<sup>147</sup>

Be that as it may, the disadvantages of the principle of agreement should not be exaggerated. Adjacent states have a strong interest in arriving at a settlement, for they need the delimitation of definite boundary lines before they can proceed to fruitfully exploit the seabed and its subsoil. Moreover, it should be remembered that no substantive rules could be set forth, the application of which would lead to equitable results in most situations. Article 6, paragraph 2, of the 1958 Convention was an unsuccessful attempt to lay down such rules. Since the problem of the lateral boundaries of the continental shelf is not justiciable, the wisest solution is to leave the parties free in each case to determine by agreement between themselves the most appropriate frontier line.

<sup>147</sup> See pp. 566, 568 above.

## CO-OPERATION FOR DEVELOPMENT IN THE LOWER MEKONG BASIN \*

*By Virginia Morsey Wheeler \*\**

As recently as the beginning of this century, there was little correlated development of water resources; each use was implemented separately without regard to possible conflict with other uses and sometimes to the detriment of other basin states.<sup>1</sup> When technological advances increased the benefits possible from multipurpose projects and spurred planning and utilization of water resources,<sup>2</sup> it became clear that optimum development required a basin-wide approach.<sup>3</sup> Most basin-wide planning and execution, however, have been in national, as opposed to international, basins, such as the Tennessee (U.S.), the Damodar (India), the São Francisco (Brazil), the Cauca (Colombia), the Volta (Ghana) and the Snowy Mountains (Australia). When a river basin crosses international boundaries, unified planning and development have been more difficult to achieve. Often the approach has been piecemeal, with treaties providing for specific projects at designated sites, covering some but not all potential uses, or

\* Portions of this comment are derived from the following sources: (1) a paper written by the author for the United Nations Institute for Training and Research (UNITAR) seminar held in Quito, Ecuador, in January, 1969; (2) papers written by the author for a seminar sponsored by the Mekong Committee on "Legal and Administrative Aspects of Lower Mekong Development with Special Reference to Initial Mainstream Projects" held August 25 to 29, 1969, in Bangkok, Thailand. The author served as Director of the Bangkok seminar. The views expressed are those of the author and do not necessarily reflect those of the United Nations, UNITAR or the Mekong Committee.

\*\* Attorney at law, Washington, D. C.

<sup>1</sup> See Teclaff, *The River Basin in History and Law* 113-119 and 157-160 (The Hague: Martinus Nijhoff, 1967). Early advocacy of the so-called Harmon Doctrine of absolute sovereignty over waters flowing within the boundaries of a state illustrates the point. See Garretson, Hayton, Olmstead, *The Law of International Drainage Basins*, 2C-23 (Institute of International Law, New York University School of Law. Dobbs Ferry, N. Y.: Oceana Publications, 1968).

<sup>2</sup> Invention of reinforced concrete around 1860 and development of earth-moving equipment made possible effective dams; development of hydroelectric power and its long-distance transmission was begun in Europe in the last quarter of the 19th century. Teclaff, note 1 above, at pp. 113-114.

<sup>3</sup> The Helsinki Rules, Art. II, define an international drainage basin as "a geographical area extending over two or more States determined by the watershed limits of the system of waters, including surface and underground waters, flowing into a common terminus." Comment (a) under Art. II includes the statement: "The drainage basin is an indivisible hydrologic unit which requires comprehensive consideration in order to effect maximum utilization and development of any portion of its waters." International Law Association, "Helsinki Rules on the Uses of the Waters of International Rivers," London, 1967. See also Garretson *et al.*, note 1 above, at p. 4.



including only a portion of a river basin.<sup>4</sup> In some instances, political difficulties have made comprehensive co-ordinated development impossible, as in the Jordan basin, or have required a physical division of the rivers, as between India and Pakistan in the Indus basin.<sup>5</sup>

By contrast, the organization and activities of the Committee for Co-ordination of Investigations of the Lower Mekong Basin (Cambodia, Laos, Thailand and the Republic of Viet-Nam) herein referred to as the "Mekong Committee," provide a heartening example of international and regional co-operation for the development of an international drainage basin on a comprehensive basis.<sup>6</sup> The co-operative success achieved is all the more remarkable since the Mekong Committee is operating in an area of the world where in other respects mistrust and animosities abound.

The jurisdiction of the Mekong Committee does not in fact cover the entire Mekong River drainage basin. The river rises in the high mountains of the Great Tibetan Plateau, flows through mainland China, and from there through or along the borders of Burma, Laos, Thailand, Cambodia and the Republic of Viet-Nam. The Lower Mekong Basin, with which the Mekong Committee is concerned, starts at a point where the borders of Burma, Laos and Thailand meet. It is defined by the Committee's statute as the area of the drainage basin of the Mekong River situated in the territory of Cambodia, Laos, Thailand and the Republic of Viet-Nam.<sup>7</sup> Even though it is not all-inclusive, the lower basin, as defined, makes a suitable area for integrated, comprehensive planning and development. Because of topography, the volume of water and size of the drainage area in the lower basin, Burma and China are not likely to be affected by, nor

<sup>4</sup> This approach sometimes succeeds, but it is likely to be less efficient and more costly. In the St. Lawrence basin, a high degree of joint development was achieved on the basis of numerous treaties between Canada and the United States covering specific beneficial uses, even though there was no single co-ordinating plan. Teclaff, note 1 above, at p. 157. On the Columbia River system, since some of the downstream projects were built in the United States before agreement with Canada, their design limited the volume of the reservoir to keep its area within U. S. territory, so that maximum potential for some site development cannot be achieved.

<sup>5</sup> The Indus Waters Treaty of Sept. 19, 1960, 419 U.N. Treaty Series 125, allots the three eastern rivers (Sutlej, Beas and Ravi) to India, and the three western ones (Indus, Jhelum and Chenab) to Pakistan, so that each country can proceed with development on a purely national basis.

<sup>6</sup> As stated in the Annual Reports of the Mekong Committee: "The Mekong Development Project seeks the comprehensive development of the water resources of the Lower Mekong Basin, including mainstream and tributaries, in respect of hydroelectric power, irrigation, flood control, drainage, navigation improvement, watershed management, water supply and related developments, for the benefit of all the people of the Basin, without distinction as to nationality, religion or politics."

<sup>7</sup> Ch. I of Statute, Committee for Co-ordination of Investigations of the Lower Mekong Basin, U.N. Leg. Ser. ST/LEG/SER. B/12, Legislative Texts and Treaty Provisions Concerning the Utilization of International Rivers for Other than Navigation (hereinafter cited as "U.N. Leg. Texts") 267 *et seq.* The statutory definition of Lower Mekong Basin excludes the relatively insignificant areas of the basin which extend into North Viet-Nam.

is it probable that their unilateral action could unduly affect, any of the projects being seriously considered in the lower basin.<sup>8</sup>

The impressive fact about the Mekong River as a natural resource is not its great length, its vast drainage basin or the volume of its flow, but the negligible extent to which it and its tributaries have been developed.<sup>9</sup> Until about ten years ago, little was known about the river. The serious lack of basic data about the main stream, its many tributaries, and the basin as a whole, including its people, climate, rainfall and topography, was a major block to development. The need for systematic investigations was clear, and in 1957, in response to a recommendation of the United Nations Economic Commission for Asia and the Far East (ECAFE), the four riparian governments organized the Mekong Committee to co-ordinate those investigations. The essentially virgin character of the river, with no existing appropriations of flow, no disputes over the waters, and no structures planned or in place, provided an unparalleled opportunity for co-ordinated planning toward comprehensive development. In many ways the Mekong Committee has pioneered, and its example has helped to inspire similar co-operation in river basins elsewhere.<sup>10</sup>

#### *Existing Institutional Arrangements*

The Mekong Committee's statute was drafted by the Office of Legal Affairs of the United Nations. It was adopted by a Preparatory Committee of the four governments and was submitted by the Executive Secretary of

<sup>8</sup> The Mekong is a majestic and powerful river, one of the world's longest. Its drainage basin covers more than 795,000 square kilometers, an area larger than France or Texas. An average of nearly 500 billion cubic meters of water flow into the sea each year. At Kratie in Cambodia, slightly more than 500 kilometers from the mouth, the minimum flow is about 1,250 cubic meters per second, nearly twice the minimum flow at the mouth of the Columbia, one of North America's largest rivers. The peak flow of the river is normally at least 20 times the low flow. The lower basin covers an area of 620,000 square kilometers or about 78% of the whole basin. United Nations, *Atlas of Physical, Economic and Social Resources of the Lower Mekong Basin* (September, 1968), Preface, pp. v, vi.

<sup>9</sup> *Ibid.* It is, in the words of Dr. C. Hart Schaaf, the first Executive Agent of the Mekong Committee, "a sleeping giant . . . a source of tremendous potentialities for power production, irrigation, navigation, and flood control, a source virtually unutilized."

<sup>10</sup> The Intergovernmental Committee for the Senegal River Basin established in 1963 by agreement among Mauritania, Guinea, Senegal and Mali, and the River Niger Commission established in 1964 by agreement among Cameroon, Chad, Dahomey, Guinea, Ivory Coast, Mali, Republic of Niger, Nigeria, and Upper Volta, are similar in many respects to the Mekong Committee. See *Convention Relative à l'Aménagement Général du Bassin du Fleuve Sénégal*, Bamako, July 26, 1963, *Organization of American States, Textos de Documentos Sobre el Uso Comercial de Rios y Lagos Internacionales* (Washington, D. C., Nov. 1968), p. 296 (hereinafter cited as "O.A.S., Textos, Uso Comercial"); *Accord Relatif à la Commission du Fleuve Niger et à la Navigation et aux Transports sur la Fleuve Niger*, adopted at conference of the riparian states in Niamey, Nov. 23-25, 1964, *Organization of American States, Rios y Lagos Internacionales (Utilización para Fines Agrícolas e Industriales)* (Washington, D. C., Aug. 1967), pp. 196-200 (hereinafter cited as "O.A.S., Rios y Lagos"), 587 U.N. Treaty Series 19.

ECAFE to the Foreign Ministers of the four riparian governments for ratification. Amendments proposed by any participating government are to be examined by the Committee and take effect when approved by all participating governments.<sup>11</sup>

The Committee is composed of four members "with plenipotentiary authority." Each participating government is to appoint one member and such alternates, experts and advisers as it desires.<sup>12</sup> The Committee acts as a kind of board of directors which meets periodically to give policy direction. Although there is no statutory provision for a day-to-day working secretariat or staff, the volume of work soon made it necessary to broaden the organizational base. In December, 1958, the Committee decided to appoint an Executive Agent, with ancillary staff, to be stationed in Bangkok with authority to take decisions on a day-to-day basis on its behalf.<sup>13</sup> The Committee also appointed an international Advisory Board which meets at least twice a year to advise on technical aspects of problems and projects presented to it. To facilitate planning and co-ordination at the local level, each of the riparian member countries has set up its own National Mekong Committee.

The United Nations and its various agencies have been involved at all stages of the organization and functioning of the Mekong Committee. This close association and support have been key factors in its success. International agencies have often encouraged multinational co-operation, have acted as lenders to multinational enterprises, or occasionally have been involved in the functioning of multinational organizations.<sup>14</sup> Seldom, however, has the continuing connection with the United Nations been so close or so far-reaching as in the Mekong. The rôle of ECAFE is confirmed in the Committee's statutes:

In accordance with the decision of the Commission at its thirteenth session, the secretariat of the Commission shall co-operate with the Committee in the performance of the latter's functions.

<sup>11</sup> Statute, note 7 above, Art. 8, par. 2.    <sup>12</sup> *Ibid.*, Art. 1.

<sup>13</sup> Schaaf and Fifield, *The Lower Mekong: Challenge to Cooperation in Southeast Asia* 97 (Princeton, N. J.: D. Van Nostrand Co., 1963).

<sup>14</sup> An early example was the power given to the Council of the League of Nations to appoint the chairman of a permanent technical hydraulic system for the Danube and Olt Basins. Art. 293 of the Treaty of Trianon (Treaty of Peace between the Allied and Associated Powers and Hungary), signed June 4, 1920, *Treaties, Conventions, International Acts, Protocols, and Agreements between the United States of America and Other Powers, 1910-1923*, Vol. III, pp. 3539 *et seq.* (Government Printing Office, 1923). The Food and Agriculture Organization of the United Nations was instrumental in the formation of the Latin American Forest Research and Training Institute and is represented on its Governing Council, 390 U.N. Treaty Series 228. See also Fligler, *Multinational Public Enterprises* (International Bank for Reconstruction and Development, September, 1967), pp. 55-57. Agencies of the United Nations have been involved at various stages in development and operations of the River Niger Commission, see T. O. Elias, Note, "The Berlin Treaty and the River Niger Commission," 57 A.J.I.L. 873 (1963). The World Bank played a significant part in the negotiation and implementation of the treaty between India and Pakistan concerning the waters of the Indus system of rivers. See Garretson *et al.*, note 1 above, at pp. 457 ff.

\* \* \* \* \*

The Executive Secretary of the Commission or his representative may at any meeting make either oral or written statements concerning any questions under consideration.

\* \* \* \* \*

The Committee shall submit reports to participating governments and annually to the Commission.<sup>15</sup>

The terms of reference for the Executive Agent, as adopted by the Mekong Committee, provide that the Executive Agent will maintain close liaison with the ECAFE secretariat and be subject to the direction and guidance of the Executive Secretary of ECAFE in regard to policy matters. The Mekong secretariat benefits from sharing with ECAFE administrative facilities and the services of some staff members. Further, since 1964, the United Nations Development Program has provided expert staff for the office of the Executive Agent under an institutional support project. A total of 16 United Nations agencies have co-operated within the Mekong Committee's program.<sup>16</sup>

The rôle of the United Nations and its agencies in providing technical advice and skills of kinds not readily available in the riparian countries has been a vital one. Even more important than its monetary and technical value, however, is the fact that the "U.N. presence" has provided a stabilizing influence and has tended to reassure the participating members that decisions and operations of the Committee will be impartial and will be based on economic and technical realities, "for the benefit of all the people of the Basin, without distinction as to nationality, religion or politics."<sup>17</sup>

#### *Present Activities of the Committee*

The functions of the Mekong Committee are:

to promote, co-ordinate, supervise and control the planning and investigation of water resources development projects in the Lower Mekong Basin. To these ends the Committee may:

- (a) prepare and submit to participating governments plans for carrying out co-ordinated research, study and investigation;
- (b) make requests on behalf of the participating governments for special financial and technical assistance and receive and administer separately such financial and technical assistance, and take title to such property, as may be offered under the technical assistance programme of the United Nations, the specialized agencies and friendly governments, or other organizations;
- (c) draw up and recommend to participating governments criteria for the use of the water of the main river for the purpose of water resources development.<sup>18</sup>

<sup>15</sup> Statute, note 7 above, Arts. 3, 5, 6.

<sup>16</sup> Committee for Coordination of Investigations of the Lower Mekong Basin, Semi-Annual Report: 1 January-30 June 1969, Note by the Executive Agent, Vol. 1, p. 5 (U.N. Doc. E/CN.11/WRD/MKG/L.276, June 30, 1969).

<sup>17</sup> This phrase has been contained in the introduction to most of the Mekong Committee's Annual Reports. See note 6 above.

<sup>18</sup> Statute, note 7 above, Art. 4.

The Committee was conceived primarily as an investigatory and advisory body of a technical, non-political nature. Even so, to help overcome the historic animosities and the climate of suspicion which existed between some of the riparian states, a number of safeguards were provided in the institutional arrangements for the Mekong Committee. The rôle of the United Nations and its agencies has been mentioned. In addition, to allay fears that sovereignty might be infringed, there are protections in the statute. Article 8 states:

It is understood that, while in all technical matters which are within the competence of this Committee, the participating governments shall act through this Committee, the stipulations contained in this statute shall not in any way affect, supersede or modify any of the agreements which are presently in force or which may be hereafter concluded between any of the interested governments relating to the Mekong river.<sup>19</sup>

Additional safeguards are the requirement of 100% attendance at Committee meetings and a stipulation that decisions of the Committee shall be unanimous.<sup>20</sup> Similar devices have been used in the constituent documents of comparable organizations in other parts of the world.<sup>21</sup> These provisions have encouraged the participating states to work together without fear that they may be outvoted in any matter of basic importance to their own self-interest. For short periods the Mekong Committee has had to face the problem of non-attendance of one of its members. However, although no official action could be taken at the Committee level until a later date, the authority of the Executive Agent, buttressed by continuing

<sup>19</sup> *Ibid.*, Art. 8, par. 1.

<sup>20</sup> *Ibid.*, Art. 5.

<sup>21</sup> The Moselle Commission has jurisdiction to approve or disapprove proposed works in the bed of the river and also has rule-making functions concerning navigation and shipping. It is to act by unanimous agreement of delegates present or represented. Convention, Commission et Société Internationale de la Moselle, between Germany, France, Luxembourg, Oct. 27, 1956, O.A.S., Textos, Uso Comercial 213. The International Commission for the Protection of the Rhine against Pollution does research and proposes to member governments measures to protect the Rhine against pollution. It can act only on the basis of unanimous decisions (but the absence of one delegation is not an obstacle to unanimity). Agreement Concerning the International Commission for the Protection of the Rhine against Pollution, between the Federal Republic of Germany, France, Luxembourg, Netherlands, Switzerland, Berne, April 29, 1963, O.A.S., Textos, Uso Comercial 209. The European Commission of the Danube has a variety of functions, including establishing traffic regulations for navigation, planning and data collection and some construction responsibility. Decisions on ordinary subjects require a majority vote of members present, but on crucial matters such as a decision to build a major hydraulic installation, the vote of a majority of the entire Commission is required, and the riparian country in whose territory the project is to be built has a veto. Convention Regarding the Regime of Navigation on the Danube, between U.S.S.R., Rumania, Ukrainian S.S.R., Czechoslovakia, Yugoslavia, Belgrade, Aug. 18, 1948, 33 U.N. Treaty Series 196. In the Central Commission for Navigation on the Rhine, decisions taken by majority vote are recommendations. Those adopted unanimously are obligatory unless within a month a contracting state advises the Commission that it refuses to approve. Art. 46 of Mannheim Convention of Oct. 17, 1868, as revised by Strasbourg Convention of Nov. 20, 1963, between Germany, Belgium, France, Great Britain, Netherlands, Switzerland, O.A.S., Textos, Uso Comercial 187.

informal contacts among all four Committee members, was sufficient to enable the Committee's activities to proceed.

During its 12 years of existence, the programs of the Mekong Committee have covered a broad range and have sparked widespread results. Its early efforts were concentrated upon setting up the necessary arrangements for collecting the basic hydraulic, mapping and other data without which project feasibility and design cannot be determined. It also has proceeded, either directly or in collaboration with other agencies of the four member governments, with related engineering, economic, fiscal, social and administrative inquiries. The Committee's operations are flexible; it may in some instances undertake surveys directly; in others, such as those relating to projects located within one of the member states, it may merely assist that state to obtain the necessary resources or to find experts to handle the matter.

The five-year objectives of the Mekong Committee for the period 1968-1972 give an idea of the scope of its activities.<sup>22</sup> These include continuation of work in basic data collection and studies in the fields of agriculture, archaeology, ecology, fisheries, forestry, geology, industry, mineral resources and power markets. A work of great importance is the completion and periodic revision of a master basin-wide plan. In respect of particular projects, feasibility reports are to be completed on five mainstream projects. Two bridges are to be constructed and a navigation improvement program is to be continued. On 26 tributary projects assistance is to be given in various phases, from feasibility reports through financing and construction. Other programs relate to health and literacy, establishment and operation of a basin-wide flood forecasting and warning system, development of pioneer irrigation areas and development and training of riparian staff. In addition to riparian state participation and that of the United Nations and its agencies, the Committee has obtained assistance from 26 countries outside the Lower Mekong Basin.<sup>23</sup> By February, 1970, the total resources pledged to the Mekong Committee or to projects sponsored by the Committee equaled the equivalent of \$198 million.<sup>24</sup>

#### *Future Rôle of the Committee*

The success of the Mekong Committee in fostering co-operation and co-ordination during the stage of planning and investigations has brought it in little more than a decade to the threshold of mainstream development. In the early years, emphasis was on tributary projects, which were smaller, more easily financed and constructed, and which could give the states necessary experience. A number of such projects have reached the stage of construction or operation. Meanwhile, several potential projects on the main stream are being investigated, and one of the most promising of the multipurpose projects is the Pa Mong. For a number of years, the U. S. Bureau of Reclamation, working on behalf of the Mekong Committee, has

<sup>22</sup> Semi-Annual Report, note 16 above, Annex 3.

<sup>23</sup> *Ibid.*, p. 5.

<sup>24</sup> Mekong Monthly Bulletin, January, 1970, Vol. 3, No. 1.

been engaged in a feasibility study of the Pa Mong Project, located at a site where the Mekong River forms the boundary between Laos and Thailand. If constructed, the Pa Mong would be one of the great multi-purpose projects of the world. Ultimately it could generate some 20 billion kilowatt-hours of firm power annually and provide water for irrigation of up to five million acres in northeast Thailand and in Laos. It could afford important hydraulic benefits for the downstream riparians, Cambodia and Viet-Nam, as well, including a measure of flood control, a more than triple increase in the dry season flow, to provide possible double-cropping of fertile irrigated areas in the delta, and improved navigation. The estimated cost of the first stage alone would be in excess of a billion dollars.<sup>25</sup>

Implementation of a project such as the Pa Mong would require negotiation of new international agreements, creation of new administrative organs and decisions upon many basic matters of policy among the four basin states. One of the first questions to be faced is the proper order of procedure: whether the basin states should attempt to negotiate a broad general over-all water treaty or whether they should limit their discussions and agreements to particular problems as they arise. Fortunately, the Mekong Committee has in preparation and almost ready for discussion among the four basin states a draft basin-wide plan, based upon the data and experience gathered during the past decade. Discussion of this plan should assist the four states to place mainstream development in its proper perspective and framework.

Much thought is being given to the next stage in development of the Lower Mekong Basin and to the rôle which the Mekong Committee should play.<sup>26</sup> In August, 1969, under the auspices of the Committee, a seminar was held in Bangkok on "Legal and Administrative Aspects of Lower Mekong Development with Special Reference to Initial Mainstream Projects."<sup>27</sup> A recurring theme throughout the seminar was the rôle of the

<sup>25</sup> U.S. Bureau of Reclamation, Pa Mong Project Stage One Interim Report 1969.

<sup>26</sup> Dr. Boonrod Binson, the Committee member for Thailand, has summarized his ideas of future legal needs as follows: "The basic requirements for such future developments may be summarized as (i) a Lower Mekong Basin water treaty; (ii) an agreement among the four riparian countries for the strengthening of the present Mekong Coordinating Committee, empowering it to function as the Mekong Basin Development Committee or regulatory commission; and (iii) agreements between two or more of the riparian countries for the development of specific projects, within the context of the Basin water treaty and of the Mekong Basin Development Committee." Binson, "Systems of Administration of International Water Resources," paper prepared for Panel of Experts on Legal and Institutional Implications of International Water Resources Development, Vienna, Dec. 2-9, 1968, Agenda Item 4, p. 19.

<sup>27</sup> The seminar was attended by personnel from the four basin states, by representatives of ten additional countries, of the Mekong secretariat, of U.N.D.P., W.H.O., E.C.A.F.E., and by experts and consultants, including a former French representative in the Rhine Commission, the Special Legal Adviser to the World Bank, the Commissioner of the U.S. Bureau of Reclamation, the Deputy Director of the General Legal Division of the U.N. Office of Legal Affairs, the Assistant General Counsel of the Asian

Mekong Committee. Its value as an institution was recognized, and there was agreement that it should be retained and its powers broadened to enable it to meet the challenges arising during the stage of project implementation. These views were merely recommendations to the Mekong Committee, and any rôle for the Committee beyond that provided in its existing statute must be agreed upon by the four riparian governments. The benefits of co-ordinated, comprehensive development of water resources have been recognized in the establishment and operations of the Mekong Committee.<sup>28</sup> There is in the Mekong Basin an unparalleled opportunity to achieve such development, if the spirit of co-operation fostered within the Mekong Committee is continued and nurtured.

The strains upon co-operation are likely to increase, however, as the pace of development intensifies, and the crucial question will be whether the four basin states will continue co-operation for co-ordinated, comprehensive development beyond the stages of planning and data collection and into the stage of project construction and operation. The operations of the Mekong Committee illustrate the truth of the statement that the mere existence of a continuing body which includes men who can approach problems in a spirit of co-operation, with primary emphasis on technical rather than political ends, is a giant step forward, and one much more likely to lead to satisfactory solutions than if problems are left to haphazard decision at the diplomatic level as they arise.<sup>29</sup>

Additional planning and investigations will be needed at all stages of development. Experience indicates that it may be desirable to broaden the planning jurisdiction of the Mekong Committee which, according to its statute, covers only "water resources development projects."<sup>30</sup> In practice, however, the limitations of the statutory language have not impeded action, since the four Committee members, as "plenipotentiary representatives," acting on the basis of instructions from their governments, carry out whatever planning and investigations the governments approve.

---

Development Bank, the Associate Director of the Swiss Federal Bureau for Hydro-Economy, an official of the U.S. Army Corps of Engineers, and university professors from the United States and Japan.

<sup>28</sup> See note 6 above.

<sup>29</sup> See conclusions of the chapter on "Administration" in Garretson *et al.*, note 1 above, p. 146.

<sup>30</sup> Art. 4 of Statute, note 7 above. Optimum river basin development includes a great deal more than the provision of properly designed and constructed structures. The Committee realized this, and its investigations and planning include power market surveys, surveys of forestry and mineral resources, etc. Planning for water resources development cannot be divorced from planning for other resources and purposes. A proposal for changing the name of the Committee to "The Committee for Coordination of Comprehensive Development of the Lower Mekong Basin" and for broadening its powers to include other development projects related to water resources development has been considered but has not yet been formally adopted. Implicit in this proposal was the realization that limitation of investigation and planning to water resources projects in the narrow sense was not realistic. In any event the Committee is likely to concentrate on regional rather than purely national planning and investigations, and close liaison with the national planning agencies is required.



The Committee can help the four basin states to reach the agreements prerequisite to mainstream project implementation by developing policy and guidelines and appropriate criteria for equitable sharing of costs and benefits of international projects.<sup>31</sup> In addition, as has been mentioned, discussion of the draft basin-wide plan within the Committee should afford an opportunity for exchanges of views on many questions of principle which will ultimately form the basis for agreements among the four states. Two basic principles were adopted at the joint meeting of member countries held in May, 1957, which led to the creation of the Mekong Committee, namely:

- (a) as a result of the projects recommended [by the Mekong Committee], the existing low water discharge of the Mekong would not be reduced in any way at any of the sites; and
- (b) the supplies to be diverted for irrigation purposes would be met by storage of flow during high stages of the river.<sup>32</sup>

There are a number of existing treaties which are pertinent to Mekong development, but they cover primarily matters such as navigation and boundaries. Many of their provisions are overlapping and confusing.<sup>33</sup> There are no existing agreements which specifically cover any of the proposed mainstream projects.

A single agency with supranational powers to plan, construct and operate projects within the basin might in theory be the simplest and most efficient means to obtain co-ordinated comprehensive basin-wide development. In an international basin, however, the reluctance of the basin states to relinquish sovereign rights makes such an approach improbable.<sup>34</sup> The crux of the problem is how to achieve the co-ordination and integration

<sup>31</sup> See Art. 4 (c) of the Committee's Statute, quoted in the text at note 18. Cf. the U.S.-Canadian International Joint Commission, which is designated as an agency to which either government or both may refer boundary waters problems for investigation, study and recommendations. Treaty between the United States and Great Britain on Boundary Waters and Questions Arising along the Boundary between the United States of America and Canada, Washington, D. C., Jan. 11, 1909, 36 U.S. Stat. (Part 2) 2448; 4 A.J.I.L. Supp. 239 (1910).

<sup>32</sup> U.N. Doc. ECAFE/WRD/1, p. 2, par. 6 (May 30, 1957).

<sup>33</sup> In addition, there are some treaty provisions which exist on paper but which are not being implemented in practice. See Caponera and Wohlwend, "Legal Aspects of Mekong Navigation," ECAFE Doc. WRD/MKG/INF/L. 309 (April 1, 1969), and Wohlwend, "Legal Aspects of Lower Mekong Basin Development," ECAFE Doc. WRD/MKG/INF/L.313/Rev. 1 (Sept. 15, 1969). It was a recommendation of the Mekong Legal Seminar referred to above (see text and note 27) that the existing treaty regime of the basin should be studied with a view to selecting those treaty provisions which have continuing validity, identifying areas of uncertainty or differences, eliminating unnecessary or no longer applicable provisions and suggesting areas in which new agreement may be necessary.

<sup>34</sup> See Garretson *et al.*, note 1 above, at p. 145: "As development advances along a river, coordination in specific project design and in water control becomes essential . . . establishment of a central supranational authority with the power to override existing national and local agencies in important matters of policy and administration would be theoretically desirable, but the hope is utopian in most cases."

necessary for comprehensive development without unduly infringing the individual sovereignty of the basin states.

The present tendency within the Committee is to treat projects at two levels. Tributary projects located within a single country are regarded as primarily national; those on the main stream are recognized as having technical and economic interdependence, so that co-operative and co-ordinated action is indispensable.<sup>35</sup> The Committee's involvement in tributary projects has varied. In some it has been substantial, especially during the stages of investigations and financing. Nevertheless, when the tributary projects are brought into operation, they are administered by national agencies. The Committee continues to have an interest in them, and it acts as a kind of clearing house for information. Water resources development in the Lower Mekong region is in its infancy, so that there is much to be gained through a continuing exchange of data. Lessons learned from one project can be applied to help avoid or solve problems on the next. It is to be hoped, therefore, that the existing co-operative sharing of information will be continued and strengthened.<sup>36</sup>

Variations in types of institutional arrangements for water resources development are almost limitless. Thus, when the time comes for the four Lower Mekong Basin states to decide upon the future rôle of the Mekong Committee, there are many possible ways in which it can be strengthened or altered so as to help achieve the goal of co-ordinated comprehensive development. The basin states may prefer to establish new or separate agencies, but use of the existing Mekong Committee by giving it broader powers would appear to be desirable. Possibilities include broader powers of investigation and planning,<sup>37</sup> regulatory and rule-making powers<sup>38</sup> and investigatory functions of a quasi-judicial nature. Flexibility might be gained if special technical boards, agencies or autonomous bodies linked to the Committee were set up to perform specific types of functions ranging from special investigations to construction and operation of projects.

<sup>35</sup> See Schaaf and Fifield, note 13 above, at pp. 100, 111.

<sup>36</sup> The exchange of information during construction and operation of tributary projects is not specifically covered in the Committee's statute. In the Niger River Basin, the basin states have made explicit that the states undertake to establish close co-operation with regard to the study *and the execution* of projects. Act Regarding Navigation and Economic Cooperation between the States of the Niger Basin adopted at conference of the riparian states of the River Niger, its tributaries and sub-tributaries, Niamey, Oct. 24-26, 1963, O.A.S., Rios y Lagos 190-192, 587 U.N. Treaty Series 9; 636 U.N. Treaty Series.

<sup>37</sup> See note 30 above.

<sup>38</sup> The Mekong Legal Seminar, referred to in note 27 above, recommended that the basin states study, among other things, "the future role of the Mekong Committee, that is, the appropriate extension of its functions and powers, including the extent to which certain basin-wide regulatory powers for the Mekong Committee may be required in respect of water storage and release, power production, navigation, irrigation, fisheries, pollution and other water uses in order to provide the requisite assured economic basis and external financial support for particular projects."

In the field of navigation, which is still the principal use of the Mekong main stream,<sup>39</sup> the need for international co-ordination or regulation is apparent.<sup>40</sup> In the Lower Mekong region, commissions have functioned in the past, and existing treaties provide for such a commission, but in fact none exists.<sup>41</sup>

There is also need for a body with investigative and administrative functions, such as surveillance of the state of the waterway, removal of obstacles to navigation and maintenance of the river channel, either directly or indirectly through co-ordination of national services. The Mekong Committee has in progress a number of programs for improvement of navigation, so that it is performing a catalytic or co-ordinating rôle in certain reaches of the river, but additional action and co-ordination are required.

Fisheries are an important resource in the Mekong basin, and co-ordinated action among the basin states is essential to ensure the preservation and optimum development of this resource. Often bodies which have regulatory powers in this field are endowed with investigatory powers as well.<sup>42</sup> This is another area in which it would be logical for the basin states to use the services of a Mekong Committee of expanded powers.

<sup>39</sup> The Mekong is navigable for ocean shipping in the Vietnamese and Cambodian reaches. Above Kratie, Cambodia, navigation is blocked by Khone Falls, but there is considerable cross channel and river traffic in the Lao-Thai sector. It is especially important to Laos, which is a landlocked country; there are no existing bridges over the Mekong.

<sup>40</sup> Examples of regulatory commissions elsewhere include, e.g., the Central Commission for Navigation of the Rhine, discussed in O.A.S., *Textos, Uso Comercial* at 162, and in Garretson *et al.*, note 1 above, at 127; the European Commission of the Danube, Garretson *et al.*, note 1 above, at 126-127, and the River Niger Commission, note 36 above.

<sup>41</sup> A French-Siamese High Permanent Commission was established under a 1926 convention between France (on behalf of its colonies in Indochina) and Siam and functioned from 1928 until the beginning of World War II. A Mekong Consultative Commission was organized under a convention of 1950 concerning navigation, signed by the three states of Indochina and by France. Thailand was not a party. The convention was abrogated in 1954. A 1954 convention among Cambodia, Laos and Viet-Nam provided for a Mekong Commission with powers over navigation, but it never became operative. See Caponera and Wohlwend, and Wohlwend, note 33 above.

<sup>42</sup> For example, Canada and the United States established the Great Lakes Fisheries Commission to formulate research programs, co-ordinate and undertake research and recommend appropriate measures to the two countries on the basis of its findings. It had powers to conduct investigations and hold public hearings, and each country agreed to furnish information and to enact legislation to give effect to the convention. Convention between the United States and Canada on Great Lakes Fisheries, Washington, D. C., Sept. 10, 1954, 238 U.N. Treaty Series 98, U.N. Leg. Texts No. 62, p. 201. The River Niger Commission and the Interstate Committee of the Senegal River are both charged with elaboration of regulations for the application of the conventions under which they were organized. Those conventions require the riparian states to submit to the committee or commission projects which might appreciably modify the flora and fauna of the river. Concerning the Niger, see Accord, note 10 above. *Re* the Senegal, see Convention, note 10 above.

The Committee has sponsored studies and investigations of fisheries, but it has not been involved in any action of rule-making or regulatory nature.

The hazards of pollution are causing increased concern everywhere. One of the advantages of arriving late in the field of water resources development is that improved technology and the benefit of the mistakes of others who have gone before are available. Here, too, co-ordinated action is required, since pollution affects the whole course of the waterway. An advisory, regulatory or supervisory body is needed to study conditions and recommend measures for control. The Mekong Committee either directly or acting through a subsidiary technical body could be an appropriate agency to perform these functions.<sup>43</sup>

As the development pace quickens, electrical interconnections, grid operation and exchanges of power are likely to be both desirable and necessary. This will require standardization of transmission and distribution voltages and facilities and co-ordination of a variety of activities. Co-ordination through the Mekong Committee at the outset can avoid costly changes in the future. The existing Mekong Committee performs some of these functions, but a broadening of its power in this field might be desirable.<sup>44</sup>

As indicated above, there is a tendency to treat tributary projects in the basin as purely national in character, although mainstream projects are regarded as having international implications, even though they may be located wholly within one country. The huge amount of water and the present undeveloped state of water resources may have influenced these decisions.<sup>45</sup> The fact that there is an abundance of water and no real conflict among the countries for its utilization would make it easier to agree now to some form of co-ordination and control of tributary projects as well as those on the main stream, through an agency such as the Mekong Committee. If the countries wait until the time when intensified development encounters conflicts in water utilization, it may then be more difficult to agree upon procedures for settling or avoiding differences. There are a number of possible ways in which an expanded Mekong

<sup>43</sup> Under the Agreement Concerning the International Commission for the Protection of the Rhine Against Pollution, note 21 above, the Commission is to engage in research to determine the nature, importance and origin of pollution, to propose to the governments measures to protect against pollution, and to prepare eventual arrangements among the governments concerning pollution. Under Arts. IV and VII of the Boundary Waters Treaty between the United States and Great Britain, note 31 above, pollution problems may be submitted to the International Joint Commission which is to investigate and recommend remedial action. Implementation of pollution abatement measures remains the responsibility of the municipal authorities within the two states.

<sup>44</sup> The U.S. Bureau of Reclamation, Pa Mong Project Stage One Interim Report 1969 states (p. II-4): "No regional power organization exists at this time. Some form of regional organization for intercountry standardization, coordination, distribution, and regulation will be required to manage the development of Lower Mekong Basin power in blocks as large as Pa Mong and other main stem projects are capable of producing. The Mekong Committee may provide the structure within which such an organization could be established."

<sup>45</sup> See notes 8 and 9 above.

Committee could serve. Subject to whatever guidelines, review or safeguards the governments may wish to impose, the Committee could be given the power to examine and approve or disapprove proposed projects within the basin which would affect more than one of the riparians, or which would impound more than a specified amount of water.<sup>46</sup> Grant of the power to approve or disapprove operating rules for projects which regulate the flow of water would be a way to further the integrated operation of a basin-wide system. It would seem desirable that here, too, jurisdiction should extend to tributaries as well as mainstream projects, if the proposed reservoir would impound in excess of a specified amount of water.<sup>47</sup>

No matter what powers are given to the Committee, its orientation toward a technical, non-political approach to problems should be retained. Any change in the 100% quorum and unanimity rules should be approached cautiously with appropriate regard to the sovereignty of the four basin states. Nevertheless, those provisions should be examined in light of each specific function to be undertaken by the Committee. A more flexible requirement for certain functions might be desirable even if for others the original rules were retained.<sup>48</sup> Similarly, if the Committee is given regulatory or quasi-judicial powers, the effect of its findings and regulations should be reviewed. There is a broad range of possibilities. The Committee's decisions at present are in effect only recommendations which require action by the governments before they become effective. For certain purposes it may be desirable to retain this requirement. For others, a more binding effect may be preferable, such as that a finding or regulation would become self-executing unless it were objected to within a

<sup>46</sup> The U.S.-Canadian International Joint Commission (see note 31 above) under the Boundary Waters Treaty, Arts. III and IV, must give its approval for uses, obstructions and diversions if they would affect the natural level or flow of the international waters on the other side of the line. Under the Delaware River Basin Compact among the U.S., Pennsylvania, New York, New Jersey and Delaware, P.L. 87-323; 75 U.S. Stat. 688, no project having a substantial effect on the water resources of the basin may be undertaken without approval of a commission on which each of the parties is represented. Under the Senegal River Basin convention (note 10 above), programs of development must be submitted to and be approved by the Interstate Committee if they would appreciably modify the regime, navigability, conditions of agricultural or industrial exploitation, water quality or flora and fauna of the river. The states of the Lake Chad Basin agree that before they undertake a project which might have an impact in another riparian nation, they will consult the Commission of the Lake Chad Basin. Its decisions are advisory only. Convention signed May 22, 1964, among Cameroon, Niger, Nigeria and Chad. See Garretson *et al.*, note 1 above, at p. 133. See also the Moselle convention, note 21 above.

<sup>47</sup> A somewhat similar rôle is given to the Permanent Joint Technical Commission on the River Nile, Art. 4 1(c) of Agreement between the Republic of the Sudan and the United Arab Republic for the Full Utilization of the Nile Waters, Cairo, Nov. 8, 1959, 453 U.N. Treaty Series 64, U.N. Leg. Texts No. 34, p. 143.

<sup>48</sup> See discussion of the Moselle Commission, the International Commission to Protect the Rhine against Pollution, the European Commission of the Danube and the Central Commission for Navigation on the Rhine, at note 21 above,

specified time by one of the governments.<sup>49</sup> It is probably true, however, that the moral authority of a body which does not have supranational powers may be greater than that of one which appears on paper to have them but which in fact is powerless to execute its decisions against a sovereign government which does not choose to honor them.

One question discussed within the Committee is whether an expanded Mekong Committee should be given a direct rôle to play in the construction and operation of mainstream projects. If it were, efficiency of operation would require substantial revamping of the Committee's organizational structure to give the Committee more corporate autonomy and powers. The Delaware River Basin Compact<sup>50</sup> and the Commission established under it could serve as examples. The Delaware River Basin Commission's powers include co-ordination, planning, data collection, water allocation in accordance with the principle of equitable utilization, granting approvals to projects, pollution abatement and control, flood control, and construction and operation of any projects or facilities necessary for accomplishing the purposes of the compact.

Another approach would be through a grant of power to the Committee to create authorities which would then act as autonomous entities to construct and operate individual projects. Some form of municipal legislation in the countries affected would also be required.<sup>51</sup> Still another form of participation in project operation would be through representation of the Mekong Committee or of its members *ex officio* on the governing bodies of the various operating entities. However, any form of direct participation in the operational phase of projects might be inconsistent with the exercise of regulatory powers over those projects.

### Conclusion

In no other international river basin has planning and co-operation among all the basin states begun at such an early stage and continued through implementation for co-ordinated comprehensive development. There are some favorable signs pointing toward achievement of this goal in the Lower Mekong Basin. The Mekong is still almost a virgin river; there are no existing structures on the main stream which need be taken into account in the negotiation of any agreements; nor has there been any substantial appropriation of water by any of the riparian states. There are no disputes over the waters; and the area is a tropical one of abundant, although seasonal, rainfall. Projects such as the Pa Mong which are nearing the stage of implementation could, if co-operatively developed, provide

<sup>49</sup> For some examples of differing requirements as to quorum and vote required for decisions on a variety of subjects, see note 21 above.

<sup>50</sup> See note 46 above.

<sup>51</sup> Cf. Sec. 14.22 of the Delaware River Basin Compact, note 46 above.

tremendous benefits for all four of the basin states; and the co-operative spirit nurtured by the Mekong Committee is helping to establish a favorable climate for negotiation of necessary agreements.

The Mekong Committee has demonstrated its usefulness. If its jurisdiction and powers are appropriately broadened, it can continue to serve the four basin states in an expanded co-ordinating and regulatory rôle which can sustain progress toward basin-wide co-ordinated comprehensive multipurpose development.

## EDITORIAL COMMENT

### THE U.N. AND HUMAN RIGHTS COMPLAINTS: U THANT AS STRICT CONSTRUCTIONIST

A significant setback in the international protection of human rights occurred on October 28, 1969, when the Secretary General of the United Nations, U Thant, directed the 51 U.N. Information Centers throughout the world to discontinue the long-standing practice of receiving and forwarding communications on human rights matters to the United Nations.<sup>1</sup> This unfortunate and backward decision, taken in response to protests by the Soviet Union after a group of Soviet citizens attempted to deliver a petition to the U.N. Information Center in Moscow in June, 1969,<sup>2</sup> represents a severe and perhaps fatal check to the promising development of an informal right of petition to the United Nations.<sup>3</sup>

Although the U.N. Charter contains numerous references to human rights, it does not establish the necessary procedures to guarantee their protection.<sup>4</sup> Specifically, "it fails to provide the individual with the right of petition to complain of the violation of such rights except in the Trusteeship System."<sup>5</sup> While the contention has been made that an individual right of petition can be implied from the Charter,<sup>6</sup> actual U.N. practice cuts the other way.<sup>7</sup> At its first session in 1947, for instance, the Human Rights Commission adopted a self-denying rule to the effect that it would take no action on individual human rights complaints.<sup>8</sup> This rule was reaffirmed in 1959,<sup>9</sup> and a 1967 modification that permits the Commission to

<sup>1</sup> Letter from Agha Abdul Hamid, Assistant Secretary General, Office of Public Information, to Directors of United Nations Information Centers, Oct. 28, 1969, reproduced in U.N. Note No. 3572, at 1 (Oct. 28, 1969) (hereinafter cited as U.N. Note No. 3572).

<sup>2</sup> This petition has been published under the title "An Appeal to the UN Committee for Human Rights" in 13 N.Y. Review of Books, Aug. 21, 1969, at 37.

<sup>3</sup> For the slow development of a formal right of petition, see J. Carey, UN Protection of Civil and Political Rights 84-94, 135-139, 143-153 (1970).

<sup>4</sup> See Huston, "Human Rights Enforcement Issues of the United Nations Conference on International Organization," 53 Iowa Law Rev. 272 (1967).

<sup>5</sup> Parson, "The Individual Right of Petition," 13 Wayne Law Rev. 678, 689 (1967), citing U.N. Charter, Art. 87, par. b.

<sup>6</sup> See, e.g., H. Lauterpacht, International Law and Human Rights 244 (1950).

<sup>7</sup> See text at notes 8-10 below. But see McDougal and Bebr, "Human Rights in the United Nations," 58 A. J. I. L. 603, 640 (1964), who argue that this practice "is not required by the provisions of the United Nations Charter but is even in contravention of such provisions."

<sup>8</sup> U.N. ECOSOC Res. 75 (V).

<sup>9</sup> U.N. ECOSOC Res. 728 F (XXVIII).



study communications revealing "gross violations" and a "consistent pattern of violations" still awaits implementation.<sup>10</sup>

True, slight progress has occurred in several areas. The Convention on the Elimination of All Forms of Racial Discrimination,<sup>11</sup> adopted by the General Assembly in 1965, and the Covenant on Civil and Political Rights,<sup>12</sup> adopted the following year, potentially "mark a giant step forward in the protection of individual human rights,"<sup>13</sup> since Article 14 of the former and the Optional Protocol to the latter permit states parties to recognize the competence of U.N. committees to receive communications from individuals concerning violations of human rights.<sup>14</sup> Moreover, the Sub-Committees on Petitions of the General Assembly's Special Committees on Colonialism and Apartheid have received and circulated such communications during the past decade.<sup>15</sup> Yet, despite widespread support for increased utilization of the individual right of petition,<sup>16</sup> little over-all progress actually has been made toward establishing the right generally.<sup>17</sup>

Precisely because the urgent need for strengthened international machinery to protect human rights is recognized so widely,<sup>18</sup> it came as something of a shock when the Secretary General, obviously responding to Soviet protestations, suddenly ordered the United Nations Information Centers to end this very informal but highly effective transmittal of communications. Strictly speaking, of course, it may be accurate to state, as the Secretary General subsequently did, that "[f]rom the inception of the Information Centres in many Member countries, no instructions were ever issued to them to accept and transmit complaints from individuals or groups of individuals regarding breaches of human rights. . . ." <sup>19</sup> On the other

<sup>10</sup> U.N. ECOSOC Res. 1235 (XLII). See J. Carey, note 3 above, at 84-94.

<sup>11</sup> General Assembly Res. 2106, U.N. General Assembly, 20th Sess., Official Records, Supp. 14, at 47 (U.N. Doc. A/6014 (1965)); reprinted in 60 A.J.I.L. 650 (1966).

<sup>12</sup> General Assembly Res. 2200, U.N. General Assembly, 21st Sess., Official Records, Supp. 16, at 49 (U.N. Doc. A/6316 (1966)); reprinted in 61 A.J.I.L. 870 (1967).

<sup>13</sup> Parson, note 5 above, at 695.

<sup>14</sup> See J. Carey, note 3 above, at 137.

<sup>15</sup> See *ibid.* at 146-151.

<sup>16</sup> See, e.g., Montreal Statement of the Assembly for Human Rights XI (March 22-27, 1968), and Report of the Committee on Human Rights, The White House Conference on International Cooperation 14 (Nov. 28-Dec. 1, 1965). For some practical difficulties with the right of petition, see Bilder, "Rethinking International Human Rights: Some Basic Questions," 1969 Wis. Law Rev. 171, 210-212.

<sup>17</sup> "The right to petition should be considered a human right in itself and should be exercised by more than just individuals from . . . the oppressed indigenous population of colonized nations." Parson, note 5 above, at 705. See J. Carey, note 3 above, at 143-153.

<sup>18</sup> The International Conference on Human Rights held at Teheran in 1968, while acknowledging that "the United Nations has made substantial progress in defining standards for the enjoyment and protection of human rights and fundamental freedoms," pointedly observed that "much remains to be done in regard to the implementation of those rights and freedoms. . . ." U.N. Doc. A/Conf. 32/41, at 4 (1968), reprinted in 63 A.J.I.L. 674, 675 (1969), and in International Protection of Human Rights, The Twelfth Hammaröjöld Forum 104, at 105 (J. Carey ed., 1968). See also McDougal and Bebr, note 7 above, at 629.

<sup>19</sup> U.N. Press Release SG/SM 1200, at 5 (1969). But see text accompanying note 20 below.

hand, neither were instructions issued to the contrary. Indeed, as the Secretary General himself admitted, "[f]rom the time of the inception of the Information Centres in many countries, the Directors of those centres used their own discretion and forwarded some letters or communications from individuals or organizations which, in the judgment of the Directors, were worth consideration at Headquarters."<sup>20</sup>

The Secretary General advanced three reasons for his abrupt decision to relieve Information Centers of their "post office" function. First, the number of communications received annually was small.<sup>21</sup> Secondly, to accept and transmit petitions alleging violations of human rights in host countries "would generate a tremendous protest from all host Governments—not one, but all."<sup>22</sup> Finally, even if the host countries did not respond by requesting the closure of the Information Centers, the United Nations would be "flooded with thousands of complaints from every Member State which hosts the Information Centres—thousands of complaints every month."<sup>23</sup> Neither the first nor the third reasons, which seem in conflict, are to be taken seriously. Should only a few petitions be received each year, surely the principle remains the same,<sup>24</sup> and, if a deluge occurred, certainly procedures could be devised to bring to the fore communications conveying valid grievances.<sup>25</sup> The second reason, the standard objection raised when any procedure to strengthen the international protection of human rights is proposed, does raise crucial questions, but it is strange indeed to hear this argument emanating from the Secretary General of the United Nations.

In short, as has been his wont in construing other grants of power,<sup>26</sup> U Thant here has taken a restrictive view of the terms of reference under

<sup>20</sup> *Ibid.* at 6. Actually, as explained by the Deputy Director of the Press and Publications Division of the U.N. Office of Public Information, Headquarters many years ago had issued instructions to guide the directors in the exercise of their discretion. "Over the years, Mr. Powell continued, the Centers had gotten into the practice of forwarding petitions to UN Headquarters. Sometimes these petitions were human rights petitions, sometimes general protests and sometimes the statements of individual 'crackpots.' Letters were also received at the Centers from schoolchildren. In response to a query from a Center Director in 1953, Mr. Powell . . . advised the Director (by letter) to open petitions addressed to UN officials and determine which ones should be forwarded to Headquarters. A Memorandum of December 1963 also directed Center Representatives to 'use your own discretion' in determining which petitions should be transmitted to UN Headquarters and which dealt with on the spot." Conference of Non-Governmental Organizations in Consultative Status with the United Nations Economic and Social Council, Minutes of the Meeting of the Ad Hoc Committee on Human Rights (Oct. 27, 1969), at 2 (hereinafter cited as NGO Minutes).

<sup>21</sup> U.N. Press Release SG/SM 1200, at 6 (1969).

<sup>22</sup> *Ibid.*

<sup>23</sup> *Ibid.* at 7.

<sup>24</sup> "The fact that the number of petitions received by Information Centers was small was not relevant to the basic issue involved. The few transmitted could be extremely important." NGO Minutes 3.

<sup>25</sup> See Bilder, note 16 above, at 211-212.

<sup>26</sup> For instance, the presence of U.N. troops in the Middle East. See Lillich, "The UN and the Middle East," New Society (London), June 1, 1967, at 810; and Garvey, "United Nations Peacekeeping and Host State Consent," 64 A.J.I.L. 241 (1970).

which the Information Centers were established. Rather than building upon the promising gloss of several decades,<sup>27</sup> he has chosen instead to revert to a literal interpretation of the General Assembly's original authorization of these centers, thereby foregoing further imaginative development of an informal right of petition in deference to a rigid respect for the "constitutional limitations within which United Nations Information Centres must necessarily confine their activities."<sup>28</sup> Strict constructionists of the United Nations' powers have applauded the Secretary General's interpretation,<sup>29</sup> while representatives of other countries have deplored his decision.<sup>30</sup> In any event, as several non-governmental organizations have observed,

[a] precedent which had evolved over a 20-year period had been broken. This had not been the case with other precedents which had grown up at the UN some of them contrary to established rule or even the UN Charter itself. It was not clear why the UN Secretariat had chosen now to reverse a *de facto* situation.<sup>31</sup>

Clear or not, it has been stated that the Secretary General considers the matter as "closed."<sup>32</sup> His ironic observation that "[i]f there are breaches of human rights which contravene the provisions of the Declaration on Human Rights, then all such breaches should be brought to the attention of the United Nations, *by some means or another*,"<sup>33</sup> cannot hide the fact that the United Nations has no generally recognized right of petition and, consequently, that now a vast majority of "the Peoples of the United Nations" will have no effective means, formal or informal, of raising human rights complaints.<sup>34</sup> Unfortunate as U Thant's precipitate action is, it

<sup>27</sup> See text accompanying note 20 above and at note 31 below.

<sup>28</sup> U.N. Note No. 3572, at 3.

<sup>29</sup> The Soviet representative to the Third Committee stated that "the existing procedures for the consideration of violations of human rights reflected current realities and were in keeping with the Principles and Purposes of the Charter and the requirements of contemporary international law. Her delegation was categorically opposed to attempts on the part of some States to change the procedures, because any changes would prejudice international co-operation and could lead only to friction and tension in international relations." U.N. Doc. A/C.3/SR. 1703, at 9 (1969).

<sup>30</sup> The Canadian representative to the Third Committee "deeply regretted that communications received from individuals whose fundamental rights had been violated could no longer be forwarded by the United Nations Information Centres." *Ibid.* at 17.

<sup>31</sup> NGO Minutes 3. It has been noted that "in the study of United Nations procedure it is more important to consider existing practice rather than statutory power since the former is more flexible." Parson, note 5 above, at 689, citing Buergenthal, "The United Nations and the Development of Rules Relating to Human Rights," 1965 Proceedings, American Society of International Law 132. A helpful parallel may be found in the development of common law pleading, where early writs "were penned to meet the particular circumstances of the particular cases without any studious respect for precedent." F. Maitland, *The Forms of Action at Common Law* 21 (A. Chaytor & W. Whittaker eds., 1958).

<sup>32</sup> NGO Minutes 4.

<sup>33</sup> U.N. Press Release SG/SM 1200, at 7 (1969) (emphasis added).

<sup>34</sup> See Bilder, "The International Promotion of Human Rights: A Current Assessment," 58 A. J. I. L. 728, 731 (1964). This result is especially ironic when one recalls

perhaps may produce some long-range benefit if, by highlighting a huge gap in the United Nations' human rights legislation, it causes both interested countries and concerned private organizations to redouble their efforts to achieve a universal right of petition for all individuals and groups in human rights matters.<sup>85</sup>

R. B. LILLICH

---

that Art. 19 of the Universal Declaration of Human Rights specifically guarantees individuals the right "to seek, receive and impart information and ideas through any media and regardless of frontiers." General Assembly Res. 217, U.N. Doc A/811 at 71 (1948); reprinted in 43 A.J.I.L.Supp. 127 (1949).

<sup>85</sup> See generally J. Carey, note 3 above.

## NOTES AND COMMENTS

### RETIREMENT OF EDITOR-IN-CHIEF OF THE JOURNAL

Professor William W. Bishop, Jr., Editor-in-Chief of the JOURNAL since 1962, indicated to the Executive Council of the Society at its meeting on April 24, 1970, that he felt that he should relinquish the responsibilities of Editor-in-Chief, which he has so ably carried for ten years. He had previously served in that capacity from 1953 to 1955, when he was succeeded by Professor Herbert W. Briggs, who was Editor-in-Chief until 1962. It was with much regret that the Council acceded to Professor Bishop's desire to retire from his position as Editor-in-Chief. His successor is Professor R. R. Baxter of Harvard Law School, who has been a member of the Board of Editors since 1958.

Professor Bishop's services to the JOURNAL have been outstanding, and the JOURNAL and its readers, as well as the American Society of International Law, owe him a deep debt of gratitude for the high intellectual quality the JOURNAL has maintained chiefly through Professor Bishop's devoted and conscientious labors.

ELEANOR H. FINCH

### REPORT OF THE THIRTEENTH MEETING OF THE ADVISORY COMMITTEE ON "FOREIGN RELATIONS OF THE UNITED STATES" \*

#### RECOMMENDATIONS

The Advisory Committee on *Foreign Relations of the United States* met at the Department of State on November 7, 1969. It makes the following recommendations to the Secretary of State:

1. That the Historical Office be authorized to fill immediately all staff vacancies as they occur, by appointing the most highly qualified, professionally trained candidates available, and that it should be exempted from both personnel "freezes" and the requirement to restrict appointments to transfer within the Department. Immediate action on this recommendation is required if candidates are to be assured for appointment in the summer of 1970, at the conclusion of their current academic commitments.

2. That the staff of the Historical Office be augmented promptly to keep pace with its assignment and responsibility in producing *Foreign Relations* and related compilations, and that this be done on a systematic basis. The committee—believing that authorization for the appointment of only two additional professional staff members (aside from filling existing vacant positions immediately) will enable the Historical Office to estop existing slip-

\* This report was filed with the Secretary of State under transmittal letter dated January 12, 1970.

page—recommends that this office be given two such additional positions at the earliest possible moment.

3. That, in addition, the gap between the years of publishing *Foreign Relations* and the years to which they pertain be rolled back significantly. To achieve this, the Historical Office should be urged to prepare immediately a plan to recommend the steps and staffing requirements necessary to reduce the publication gap to the agreed 20-year line and maintain it there during the 1970's. This plan should designate the staffing needs (professionals and others) as well as consider and define new procedures (where justifiable and feasible) to expedite the achievement of this roll-back goal. Recommendations should be presented to the Advisory Committee in time for consideration at its annual meeting in November 1970, but in the meantime, the Historical Office should be encouraged to present these proposals to the Secretary of State and other responsible officials of the Department as soon as they are completed, and present a progress report on developments to the committee at its next meeting.

4. That high-level Department of State support be clearly and firmly established or reconfirmed in writing to require departmental offices to ascribe essential priority to *Foreign Relations* clearance tasks, that commencement of clearance not be permitted to be put off by individual policy offices for months, and that attention be given to systematizing practice within the Department of State by the use of high and middle grade Foreign Service Officers between assignments or by *ad hoc* appointment of retired officers for this purpose if regular staff members cannot be spared for clearance duties.

5. That planning be launched to provide high-level Department of State support of the Historical Office to achieve "outside" clearance by other departments and agencies as the *Foreign Relations* series comes to involve increasing documentation concerning the newer issues of the post-World-War II era (such as nuclear, space, alliance, foreign bases, status of forces, and similar issues). The results of such contingency plans should be developed during 1970, should be reported by the Historical Office to the Advisory Committee at its next meeting, and should be launched when their application becomes essential.

6. That the Department of State take appropriate action to see to it that its series entitled *American Foreign Policy: Current Documents* continue to be produced, and that these volumes be published within not more than two or three years of the dates to which they pertain.\*

#### COMMITTEE MEMBERSHIP AND PROCEDURE

The Advisory Committee on *Foreign Relations of the United States* consists of representatives of the American Historical Association, the American Political Science Association, and the American Society of International Law, whose combined members, numbering in the thousands, constitute the aca-

\* Regrettably, this series was formally discontinued with the 1967 volume published in December, 1969, confirmed by departmental press release of Feb. 3, 1970.

ademic research community most directly interested in *Foreign Relations* and other documentary publications and records compilations relating to the foreign affairs of the United States. The current members of the committee are:

Dr. INIS L. CLAUDE	Professor of Government and Foreign Affairs, University of Virginia
Dr. DAVID R. DEENER	Provost and Dean of the Graduate School, Tulane University
Dr. HARDY C. DILLARD	James Monroe Professor of Law, University of Virginia; Judge Designate, International Court of Justice
Dr. W. STULL HOLT	Professor of History, University of Washington
Dr. ERNEST R. MAY	Dean of Harvard College, Harvard University
Dr. PAUL A. VARG	Dean of the College of Arts and Letters, Michi- gan State University
Dr. ELMER PLISCHKE (Chairman)	Professor of Government and Politics, University of Maryland.

The members of the committee were welcomed by the Acting Assistant Secretary of State for Public Affairs, Richard I. Phillips. It received oral reports from the Director of the Historical Office, Dr. William M. Franklin; the Deputy Director, Dr. Richardson Dougall; the Chief of the "Foreign Relations" Division, Dr. S. Everett Gleason; and the Chief of the Research Guidance and Review Division, Dr. Arthur G. Kogan. Other members of the Historical Office were present to provide additional information desired by the members of the committee. The committee members had the pleasure of discussing some of its findings and conclusions at lunch with the Under Secretary for Political Affairs, U. Alexis Johnson.

The Advisory Committee acknowledges its sincere appreciation to all who contributed to rendering its deliberations fruitful and rewarding. It is convinced that the staff members of the Historical Office are able, industrious, and dedicated, it is appreciative of the continued high state of excellence maintained in the *Foreign Relations* series, and it is cognizant of a great many difficulties and strains impinging upon conscientious staff members who seek to continue their high level of performance while functioning under an expectation of support that may be inadequate to maintain past standards of accomplishment.

#### SUMMARY OF FINDINGS

The Advisory Committee is concerned that *Foreign Relations* continue to be published on a regularized basis and that its compilers remain devoted to maintaining their traditionally high standards. As in past years, the committee centered attention primarily on three fundamental matters: the status and publication prospects of the *Foreign Relations* series, clearance procedures and difficulties, and problems of access to documents and materials.

### *Production of Foreign Relations*

So far as compilation progress and publication prospects are concerned, the committee is aware that over the years *Foreign Relations* has been given a low priority in the purview of the Department of State concerning its manifold activities, that the task of compiling the materials for each year (and for each individual volume) involves a growing task of reviewing an increasing quantity of documentation, that the production of the *Foreign Relations* series has gradually been slipping backward, and that as the series moves into the post-World War II period, progress is likely to be retarded even more unless a deliberate effort is made to provide the staff and procedures essential to overcome foreseeable compilation, editing, and publication problems.

Aside from delay resulting from the increasing documents collecting and screening functions, progress is impeded especially by an unfavorable personnel situation—an unfortunate combination of low departmental priority on increasing the number of Historical Office positions, the actual reduction of staff size, general personnel freezes, and the lack of authority for the Historical Office even to fill existing staff vacancies or to fill them only by reassignment of personnel within the Department, which often is unavailable if not uninterested.

The consequences of these factors are that the currency of the compilations and publication of the *Foreign Relations* series has gradually eroded—from only a few years' delay after the date to which they pertained, to a 15-year delay by the end of World War I, to 20 years by 1960, and more recently to 23 years—despite the fact that in 1962 the Secretary of State officially set the time lapse at 20 years (except in exceptional circumstances). More serious—for a number of reasons, largely relating to the quantity of personnel and restrictions on recruitment—the prospects of maintaining even the current 23-year schedule of production beyond another year or two appears to the committee as very bleak and the gap is about to slip to 25 years. The committee regards such continuous and accelerating erosion as most discouraging.

The committee understands that the Historical Office plans to reduce the number of *Foreign Relations* volumes per year from 12 (for 1945) to 8 (for 1947) and to 7 (for 1948). On this basis it is hoped to attain a compilation schedule of a year per year. The committee, welcoming the achievement of a year-per-year production schedule, views the manner of its accomplishment as a compromise with necessity reflective not as much of desirability as of restrictive personnel and other cost considerations.

These are key years in the post-World War II period so far as major policy development is concerned. The latter involve such important matters as the European Axis Satellite peace treaties, the Rio Pact and O.A.S. Charter, the Truman Doctrine and the Marshall Plan, and the North Atlantic Alliance. The committee realizes, of course, that certain phases of compilative work—especially those laborious and time-consuming tasks concerned at early stages with documentary identification and selection—cannot



be reduced simply arbitrarily by delimiting the number of final volumes to be published.

### *Clearance Problem*

The members of the Advisory Committee are aware of the sensitivities, difficulties, and problems involved in the matter of clearance of documentation for publication in *Foreign Relations*. It is our understanding that in the past denials of clearance have not been regarded as a serious debilitating or retardation factor. Nevertheless, the committee is concerned over the not inconsiderable delay in achieving clearance by other units and officers of the Department of State—despite an agreement in 1963 fixing a three-month review schedule. The committee is inclined to believe that this growing delay is not due to inability or unwillingness to ultimately provide such clearance, or to difficulty in the pragmatic matter of deciding on clearance by the approving officer, but rather that it is symptomatic of the view that this process warrants such low priority that clearance of individual *Foreign Relations* volumes recently has taken up to nearly two years (calculated from the time galleys are submitted for clearance to the accomplishment of the task). As a consequence, the Historical Office is estopped from further progress on the specific volumes concerned. The convoy proceeds only as fast as the slowest ship in the line. It appears to the committee that the Department of State ought to be able to establish procedures to overcome such protracted clearance delay. To the extent that other executive departments and agencies are involved in “outside” clearance—a problem which is bound to increase as the *Foreign Relations* series moves further into the post-World War II era—the Historical Office will need active and firm Department of State support at the highest levels to expedite such clearance.

### *Access to Documents*

The Advisory Committee also considered the matter of access by the unofficial researcher to documentary materials in the Department's files. The committee members are highly disturbed by the narrowing gap between the timing of the publication of *Foreign Relations* volumes and the open period for public access to the files (at 30 years). It considers the possibility of seeing the publication of *Foreign Relations* delayed to 30 years (therefore, matching the commencement of the open period) as most undesirable for a number of reasons. First, outside *ad hoc* publication may induce some to conclude that publication of *Foreign Relations* then becomes unnecessary, or that it may be accomplished in an abbreviated or much more superficial fashion. Second, biased privately published chronicles or collections, relying on selected documentation, which provide inaccurate or partial accounts may achieve a popular impact which, were *Foreign Relations* available, might have been offset by more objective analyses based on full documentation—and by the documents themselves.

Third, the committee is deeply concerned that slippage to 30 years may lead to moving the open period back beyond 30 years, which the committee would regard as not only disappointingly retrogressive but also violative of the commendable record the Department of State has maintained over the decades in making the foreign relations documentation of the United States publicly and systematically available. Moreover, it would be embarrassing, if not politically challengeable as advancing toward greater secrecy, to retrogress in the matter of timing of the open period while other governments (such as the United Kingdom) actually move in the opposite direction. The committee is not herewith advocating advancing the open period for full public access to diplomatic documentation, but it believes that everything should be done to prevent it from being set back in excess of 30 years.

#### *Production of Current Documents*

The committee has been apprised of the fact that the compilation and publication of the annual volumes of *American Foreign Policy: Current Documents* are adversely affected by some of the same problems and attitudes relating to staffing considered above, and that the staff engaged in preparing these volumes has had to be shifted to other duties. The committee deplores the fact that, at best, the publication of these volumes is being delayed and at worst may be discontinued, unless additional professional staff members are made available to the Historical Office. *Current Documents* has become an indispensable, widely used, and high-quality reference source. In view of the purposes served by these annual volumes, the committee regards their cost of production as being modest and sees considerable merit in maintaining their publication, and it views the specter of discontinuance as tragic.

#### *Additional subjects*

In addition, the committee discussed a variety of related subjects. Among others, these included: the emergence of a revisionist interpretation of the cold war and other elements of United States diplomacy, a mounting anti-historical and future-minded spirit abroad in the land, lack of appreciation within and outside the Department of the value of departmental historical research on recent issues, departmental advance announcement to the scholarly world of its publication plans and prospects as well as Historical Office annual releases to interested professional journals, portending difficulties of clearance respecting intelligence materials concerned with diplomatic events in the post-World War II period, the possibility of publishing deferred supplements to *Foreign Relations* concerning specific issues on which it may be difficult to acquire early clearance, the method of transferring departmental files to National Archives, the possibility of arranging access by unofficial scholars to compiled and cleared materials (*i.e.*, galleys) in advance of printing and publication, and the general departmental attitude toward the compilation and publication by the Historical Office of special studies.

## SUMMARY OF CONCLUSIONS

Deliberation on these findings has led the Advisory Committee to the following general conclusions:

1. Slippage in the compilation and publication of the *Foreign Relations* series continues; it appears to be approaching 25 years; and, unless changes are effected, it will be moving toward 30 in the next several years. This situation is more than endemic; it has become critical.

2. If slippage should continue to 30 years—when the Department's records are opened to the public—this will render the task of usage by the Historical Office more difficult and further retard its progress, or will necessitate keeping the records in the Department after 30 years and burden it with administering their use by outside researchers, or will result in keeping them closed to the public. In turn, this may encourage moving the archives' opening date beyond 30 years—thus modifying long-standing American practice and contravening the spirit of the Freedom of Information Act—which eventuality is bound to evoke adverse outside reaction and pressures by researchers, the academic community generally, the press, and Congress. The committee is convinced that the Department must do all it can to avoid letting *Foreign Relations* slip to 30 years.

3. The primary cause of slippage is not one of efficiency or morale of the current historical staff, but is due simply to attrition of personnel, various restrictions on enabling the Historical Office to fill vacancies rapidly, prohibitions on outside recruitment, and lack of provision for phased increasing of staff size to keep pace with assigned tasks. It is due, more specifically, to a net declining number of staff positions over a period of years, to "freezes" on filling vacancies in existing staff over extended periods, and to personnel practices which deny authority to recruit outside the Department. The committee realizes that this last hindrance may be temporary, but it is disturbed by lack of appreciation of the need to recruit the most highly trained, technically qualified, and dedicated specialized professionals which can be obtained—not temporary appointees who happen to be available but whose interests and careers really lie elsewhere. Qualified documentary historians with a career interest in *Foreign Relations* are as essential to the work of the Historical Office as are trained lawyers in the legal office.

4. The committee is convinced that the quantity of additional professional staff members necessary to reverse compilation and publication slippage is modest and that, in terms of the overall resources of the Department of State—to say nothing of the mass research resources of the National Government as a whole—rectification of the personnel shortage of the Historical Office should not be an insurmountable problem. Nevertheless, year by year, it continues, and persistently it worsens. The criticality of this situation can be alleviated only if relief is supplied immediately. The committee is satisfied that in coping with this matter, large problems actually can be resolved by small numbers—that is to say, the issue is not one of a brigade of bodies, but merely of a small handful of trained professionals.

5. So far as documentary clearance is concerned, the committee is of the opinion that it is essential for the Department of State to establish a policy position at a high level to require prompt action on departmental clearance, and to provide high level support of the Historical Office in obtaining clearance by other executive departments and agencies. The committee considered various techniques to expedite clearance within the Department, such as using senior or mid-career Foreign Service Officers between assignments or attaching retired career officers for this purpose, and it views this as a relatively inexpensive solution to a vexing problem. Other alternatives, such as wholesale declassification of Department of State documents on a continuous and organized basis, or of early automatic declassification, are viewed by the committee as being either more expensive and more time-consuming or as unrealistic.

6. The committee regards the indefinite deferral of the publication of *American Foreign Policy: Current Documents* to be undesirable, and deems its discontinuance to constitute a grievous loss to active officials, the researcher, and the enlightened community in general, as well as a deplorable, retrogressive action by the Department. The committee is convinced that the reason for such deferral or discontinuance is compelled by staffing considerations rather than matters of intrinsic merit.

On the basis of these findings and conclusions, the Advisory Committee submits the six recommendations presented at the beginning of this report.

ELMER PLISCHKE

#### FIFTH AWARD OF THE MANLEY O. HUDSON GOLD MEDAL

At its meeting held on November 1, 1969, the Executive Council of the Society received and adopted the unanimous recommendation of the Manley O. Hudson Medal Committee that the fifth gold medal of the Society be awarded to the eminent Swiss jurist, Professor Paul Guggenheim, at the annual meeting of the Society in 1970. The presentation of the medal was made on behalf of the Society by Edvard Hambro, Permanent Representative of Norway to the United Nations, to Bernard Turretini, Permanent Observer of Switzerland to the United Nations, who accepted the medal on behalf of Professor Guggenheim at the annual dinner at the Waldorf-Astoria Hotel in New York, on April 25, 1970.

Professor Guggenheim's notable career as a teacher and scholar, as an advocate, international arbitrator and judge, has extended over four decades. For many years he taught at the University of Geneva and the Geneva Institute of Advanced International Studies. He is the author of numerous treatises and other publications that have enriched the literature of international law; he has represented Switzerland and other countries in important causes before the International Court of Justice, and has been a judge *ad hoc* of that court and a member of the Permanent Court of Arbitration.

RALPH G. ALBRECHT

64TH ANNUAL MEETING OF THE AMERICAN SOCIETY OF  
INTERNATIONAL LAW

The 64th annual meeting of the American Society of International Law was held from April 24 to 26, 1970, at the Waldorf-Astoria Hotel in New York City. The attendance of over 700 was the largest in the Society's history. The general theme of the program was an appraisal of the United Nations at 25 years, and dealt with U.N. activities relating to peacekeeping, disarmament, lawmaking, international financing, racial discrimination, science, and environment. Three panels were devoted to questions of particular interest to lawyers: one on extraterritorial application of law, one on practical aspects of international litigation, and one on financing transnational investment.

Other events on the program were a demonstration of a treaty computerization project by Professor Peter H. Rohn of the University of Washington, and a luncheon of the Section of International and Comparative Law of the American Bar Association to which members of the Society were invited. Ambassador Richard D. Kearney, member of the U.N. International Law Commission, and Chairman of the U. S. Delegation to the Vienna Conference on the Law of Treaties, spoke at the luncheon on the Convention drawn up at the Conference. The A.B.A. Section also tendered a reception to the officers, members of the Executive Council, and Board of Editors of the JOURNAL.

The first session, held on Friday, April 24, at 2:15 p.m. consisted of two simultaneous panel sessions on the subject of the United Nations and Peacekeeping and Lawmaking, respectively. The panel on peacekeeping, under the chairmanship of Elmore Jackson of the United Nations Association of the U.S.A., consisted of the Honorable David H. Popper, U. S. Ambassador to Cyprus, who spoke on "Lessons of United Nations Peacekeeping in Cyprus," and Lawrence Fabian of The Brookings Institution, who discussed "Some Perspectives on Peacekeeping Institutions." Major General Indarjit Rikhye, former Military Adviser to the U.N. Secretary General, and Commander of the United Nations Emergency Force, spoke informally as interrogator of the preceding speakers.

The second panel, under the chairmanship of Professor Wolfgang Friedmann of Columbia University Law School, on the subject of the United Nations and Lawmaking, had as speakers Dr. Rosalyn Higgins of the Royal Institute of International Affairs, who spoke on "The Political Organs of the United Nations"; Ambassador Shabtai Rosenne, Deputy Permanent Representative of Israel to the United Nations, who spoke on "The Role of the International Law Commission"; and Dr. Derek Bowett of Cambridge University, who discussed "The Impact of the U.N. Structure, including that of the Specialized Agencies, on the Law of International Organization."

The second session on Friday at 8:15 p.m. considered Legal Aspects of the Search for Peace in the Middle East, and Financing Transnational Investment. Professor Roger D. Fisher of Harvard Law School presided

over the panel on the Middle East, on which Professor Eugene V. Rostow of Yale Law School, and Professor Quincy Wright of the University of Virginia delivered the principal addresses. Professor Robert W. Tucker of The Johns Hopkins University and Professor John J. Barceló III of Cornell Law School spoke informally as interrogators of the previous speakers.

Professor Covey T. Oliver of the University of Pennsylvania Law School presided over the panel on the United Nations system and financing transnational investment. Mr. R. B. J. Richards, General Counsel of the International Finance Corporation, spoke on "Blending Public and Private Capital"; Mr. Carroll R. Wetzell, of the Pennsylvania Bar, discussed "The Role of Edge Act Corporations in Transnational Financing"; and Mr. Franz M. Oppenheimer, of the District of Columbia Bar, spoke on "Restraints on Direct Investment." Mr. Harry Fitzgibbon of Lehman Brothers directed interrogations to the three speakers.

The third and fourth sessions on Saturday, April 25, consisted of three simultaneous panel discussions in the morning and afternoon. At 9:30 a.m. Professor Frank C. Newman of the University of California School of Law presided over the panel on the United Nations and Race. In introducing the speakers, Professor Newman gave an introductory outline of the United Nations law on racial discrimination. The Ambassador of Jamaica to the United States, Mr. Egerton R. Richardson, discussed the question "Will the Rapidly Accumulating Body of U.N. Law on Racial Discrimination Truly Be Effective?" He was followed by Mrs. Rita Hauser, U. S. Representative to the U.N. Human Rights Commission, who discussed the human rights question, including racial discrimination, as it has been treated in the United Nations. Mr. T. T. B. Koh, Ambassador of Singapore to the United Nations, and Mr. William T. Coleman, U. S. delegate to the United Nations General Assembly, spoke informally as commentators and interrogators.

A second panel on Saturday morning considered the Extraterritorial Application of Law. This practitioners' panel, sponsored jointly with the Section of International and Comparative Law of the American Bar Association, was presided over by Professor Willis L. M. Reese of Columbia University Law School. Mr. Henry Harfield of the New York Bar discussed general principles of the extraterritorial application of law; Mr. Peter A. Bator of the New York Bar discussed the application extraterritorially of U. S. securities laws, particularly the Securities Exchange Act of 1934. Mr. Isaac N. P. Stokes, also of the New York Bar, spoke on "Limits Imposed by International Law on Regulation of Extraterritorial Commercial Activity."

A third panel on Saturday morning, under the chairmanship of Professor Harold D. Lasswell of Yale Law School, discussed the United Nations and Science. Dr. Alexander Szalai, Deputy Director of Research, U.N. Institute for Training and Research, delivered a paper entitled "The United Nations and the Social and Behavioral Sciences"; Professor Dennis Livingston of Case Western Reserve University spoke on "International Technology Assessment and the United Nations System"; and Professor Mary Ellen

Caldwell of Ohio State University spoke on "The Past and Future Implications for World Health." Mr. Carroll L. Wilson of Massachusetts Institute of Technology made comments on the addresses.

On Saturday afternoon at 2:15 p.m. the panel on the United Nations and Disarmament, under the chairmanship of Dean Adrian S. Fisher of Georgetown University Law Center, consisted of Professor George Bunn of the University of Wisconsin, who spoke on "The U.N. rôle in the Banning of Poison Gas and Germ Warfare"; Mr. Charles N. Van Doren, Deputy General Counsel, U. S. Arms Control and Disarmament Agency, who discussed "The Case of the Non-Proliferation Treaty"; and Mr. Morton Halperin, of The Brookings Institution. Professor Leon Lipson, of Yale Law School, acted as interrogator of the panel.

Professor Richard N. Gardner of Columbia University Law School acted as chairman of the panel on the United Nations and the Environment, which was sponsored jointly with the American Branch of the International Law Association. The principal speakers on the subject were Mr. Christian Herter, Jr., Special Assistant to the Secretary of State for Environment, and Professor Richard A. Falk of Princeton University. Commentators were Mr. Robert E. Stein, Office of the Legal Adviser, Department of State; Timothy B. Atkeson, Special Assistant to the Chairman, Council on Environmental Quality; and Professor Donald McRae, of Columbia University Law School.

The third panel on Saturday afternoon considered the Practical Aspects of International Litigation. Mr. Ernest A. Gross of the New York Bar presided as chairman. Mr. Howard H. Bachrach of the New York Bar discussed the procedural steps in contentious proceedings before the International Court of Justice and suggested reforms in such procedure. Mr. John Carey of the New York Bar spoke on "What Litigators Should Know about the United Nations." Professor Henry P. de Vries of Columbia University Law School discussed international arbitration with specific reference to the rôle of the party-appointed arbitrator. Judges Hardy Dillard and Eduardo Jiménez de Aréchaga of the International Court of Justice participated informally in the panel.

The annual dinner was held on Saturday evening at 7:30 p.m. Professor John N. Hazard, Chairman of the Committee on Annual Meeting, presided and introduced the speakers. Ambassador Edvard Hambro, Permanent Representative of Norway to the United Nations, presented on behalf of the Society the Manley O. Hudson Medal to Professor Paul Guggenheim, on whose behalf Ambassador Bernard Turrettini, Permanent Observer of Switzerland to the United Nations, received the medal and delivered Professor Guggenheim's message of acceptance. The President of the Society, Mr. Oscar Schachter, addressed the members on "The Future of the United Nations." The Secretary of State, the Honorable William P. Rogers, delivered an address on "The Rule of Law and the Settlement of International Disputes."

The Final Round of the Philip C. Jessup International Law Moot Court competition took place on Sunday morning, April 26. The team from the

University of Miami was declared the winner, and the team from the University of Kentucky the runner-up. Other semi-finalist teams represented law schools in the United States, Argentina, France and the United Kingdom. Carson P. Porter of the University of Kentucky was declared the best oralist in the final round, and Alvin Entin of the University of Miami the best oralist in the semi-final rounds of the competition. The award for the best written memorials was given to the University of Miami. The judges of the final round were Judge Philip C. Jessup, recently retired from the International Court of Justice; Dr. F. V. Garcia-Amador, Director, Department of Legal Affairs, Organization of American States; and Professor Clive Parry of Cambridge University.

The concluding session of the Society, the business meeting, was held on Sunday morning, April 26, at 9.30 a.m. The Executive Director of the Society reported on the activities of the Society during the past year, and stated that the membership had increased to over 5,000. The good number of regional meetings had had excellent programs with good attendance. In addition to the periodical publications, whose circulation had substantially increased, the Society was publishing in 1970 a number of books including those on *The International Law of Civil War*; *International Telecommunications and International Law*; *International Law and Social Science*; *Foreign Enterprise in Mexico*; and *Nuclear Non-Proliferation*. There were in being some twenty panels of the Board of Review and Development; several panels were in the process of being formed, while some were winding up their work. A number of the books being published were based on papers commissioned by the panels. Mr. John Lawrence Hargrove, formerly of the Office of the Legal Adviser, Department of State, and currently Senior Adviser for International Law to the U. S. Mission to the United Nations, had been appointed Director of Studies to direct the work of the study panels.

Mr. Schwebel announced with great regret the resignation as of June 30 of Mr. Richard W. Edwards, Jr., as Assistant Director of the Society and Editor of *International Legal Materials*.

Committee reports were then considered. Upon the recommendation of the Committee on Annual Awards, the Society voted to award its Certificate of Merit to Professor J. H. W. Verzijl of The Netherlands for his work entitled *International Law in Historical Perspective*, as a major contribution to the literature of international law.

Upon the recommendation of the Committee on Selection of Honorary Members, the Society elected Roberto Ago of Italy an Honorary Member. Professor Ago, Professor of International Law at the University of Rome, and a member of the United Nations International Law Commission, was recommended unanimously by the Committee as a brilliant lawyer and scholar in both the public and private international law fields.

Mr. John Carey, Chairman of the Committee on Publications of the Department of State and the United Nations, reported briefly on the contents of the report and offered two resolutions which, after discussion, were adopted as follows:



RESOLUTION ON THE PUBLICATION OF  
FOREIGN RELATIONS OF THE UNITED STATES

*The American Society of International Law* assembled at its 64th Annual Meeting in New York City on April 26, 1970,

*Reaffirming* its interest in the publication of the official documentary record of American diplomacy in the series *Foreign Relations of the United States*,

*Appreciating* the high standards of scholarship and editing maintained in the preparation of these volumes,

*But deeply concerned* that this series, essential to a proper understanding of past diplomacy and as a background for present international relations, is falling further and further behind currency,

*Resolves* to call upon the Department of State to give high priority to supplying adequate support in appropriations and personnel to check the increasing lag in the publication of the *Foreign Relations* volumes and to start a return toward publication nearer to currency,

*And resolves* to collaborate with other non-governmental, non-profit, educational, scholarly, and cultural organizations in urging the Congress and the Executive Branch to place higher priorities on matters of concern to the educational, scholarly, and cultural community of the nation.

RESOLUTION ON THE DOCUMENTATION OF THE U.N.  
COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION

*The American Society of International Law*, assembled at its 64th Annual Meeting in April 1970, whose theme is "The United Nations: Appraisal at 25 Years,"

*Reaffirming* its interest and that of its members in the scholarly study through documentation and otherwise of the legally significant activities of the United Nations and related international organizations, including the Committee on the Elimination of Racial Discrimination established under the International Convention on the Elimination of All Forms of Racial Discrimination,

*Desiring* to assure that, in the interests of scholarship, teaching, and the progressive development of international law, all possible documentation of such organizations be published as promptly and widely as possible,

*Expresses* the hope that the Committee on the Elimination of Racial Discrimination will give consideration to making its documentation known and available in accordance with the customary procedures for notation and distribution of documentation of United Nations bodies.

The following officers were elected for the coming year:

Honorary President: Philip C. Jessup

President: Harold D. Lasswell

Vice Presidents: Richard A. Falk, Covey T. Oliver, William D. Rogers, and Stephen M. Schwebel

The incumbent Honorary Vice Presidents were re-elected, and Mr. Schachter elected an Honorary Vice President.

The following were elected members of the Executive Council of the Society to serve until 1973: Richard R. Baxter, Harvard Law School; Adrian S. Fisher, Georgetown Law Center; John B. Howard, New York; Monroe Leigh, Washington, D. C.; John E. Leslie, New York; Peter Trooboff, Washington, D. C.; Burns F. Weston, University of Iowa College of Law.

The Nominating Committee elected for the coming year consists of Benjamin Forman, Chairman; Donald E. Claudy, Alona E. Evans, Isaac N. P. Stokes and Howard J. Taubenfeld.

The Executive Council, at its meeting on April 24, considered the report of the Editor-in-Chief of the JOURNAL, Professor William W. Bishop, Jr., and on the recommendation of the Board elected Judge Philip C. Jessup an Honorary Editor, and Mr. John Carey a member of the Board. The other incumbent editors and honorary editors were re-elected. Professor Bishop indicated his wish to retire as Editor-in-Chief and recommended on behalf of the Board of Editors the election of Professor R. R. Baxter of Harvard Law School as his successor in that position. The Executive Council expressed its great appreciation to Professor Bishop for his services to the JOURNAL and the Society. Professor Baxter was thereupon elected Editor-in-Chief of the JOURNAL.

The recommendation of the Board of Editors that the proceedings of the annual meeting be hereafter issued as a special number of the JOURNAL was also approved by the Council.

The Council also voted to amend the Society's regulations by removing the prohibition against student members voting or holding office, and to increase membership dues in the Society and the subscription price of *International Legal Materials* and the *Journal*, as indicated below. The latter action was taken in order to provide for increasing costs of publication as well as additional income for the Society's expanded activities.

At its meeting on April 26 the Executive Council adopted amendments to the Society's regulations to provide for the changes adopted on April 24. It also voted to establish a new Committee on Student and Professional Development, to promote the Society's interest in education and professional development in international law and in the education of the public at large.

Judge Edward Dumbauld was re-elected Secretary of the Society, and Messrs. Franz M. Oppenheimer and James C. Conner, Treasurer and Assistant Treasurer, respectively. Mr. Stephen M. Schwebel was designated Executive Vice President of the Society. Mrs. Marilou Righini was appointed Editor of *International Legal Materials*.

The Executive Committee for the coming year was elected as follows: Richard R. Baxter, Richard A. Falk, Monroe Leigh, Carlyle E. Maw, Covey T. Oliver, William D. Rogers and Oscar Schachter. Messrs. Lasswell, Schwebel and Oppenheimer are members *ex officio*.

ELEANOR H. FINCH

INCREASE IN MEMBERSHIP DUES AND SUBSCRIPTION RATES OF THE  
JOURNAL AND INTERNATIONAL LEGAL MATERIALS

In view of the need for the Society to increase its income to meet the growing expenses of its activities, including the increased costs of publication, the Executive Council at its meeting on April 24, 1970, voted to raise the annual subscription price of the JOURNAL from \$20.00 to \$30.00, and of *International Legal Materials* from \$25.00 to \$35.00 for non-members of the Society, these rates to become effective January 1, 1971. The increase in membership dues, also effective January 1, 1971, is as follows: Regular, from \$15.00 to \$25.00; Professional, \$30.00 to \$40.00; Intermediate, \$10.00 to \$15.00; Student, \$5.00 to \$7.50; Life, \$500.00 to \$1,000; Annual Patron, \$250.00 to \$500.00.

E. H. F.

## CORRESPONDENCE

The Editors of the JOURNAL welcome scholarly communications and will print those considered to be of general interest to its readers

LETTER FROM PROFESSOR B. A. WORTLEY

15 April, 1970

One passage in the interesting article published in your last number, by Dr. R. Higgins, struck me as all too true: she indicates that there is

. . . a movement away from the attempted settlement of disputes by a bargaining process. The technique is closer to that of labor bargaining, within a legal framework, than to judicial adjudication. This raises acute problems for the state which believes its actions to be legally impeccable. It sees itself subjected to illegal acts by its adversary, and, when seeking a clear denunciation by the Security Council, finds that it can achieve at most a resolution admonishing both parties to desist from all illegal acts.

Unfortunately, this "bargaining process" usually amounts to conciliation which does not bind the parties to a dispute, and the admonitions which are handed out can have little effect in countries without a free press. It is submitted that these procedures do little for the rule of law.

When the Security Council can indicate that (as it did in the case of the North Korean aggression) unlawful force may be resisted by collective lawful defensive measures, more can be achieved. Experience shows that the veto may prevent this, but if it does, it may excuse but cannot alter the illegality of a deliberate invasion undertaken without a genuine attempt at pacific settlement. Conciliation, or the use of the veto, may obscure illegalities, but it cannot alter their character, nor can either impair the right of third states to discriminate against an aggressor.

In the 1946 *British Year Book of International Law*, at page 110, I stated:

If a permanent Member commits an act of aggression the veto may render impossible any action under the Charter, but action will still be possible under the ordinary international law, since the Charter merely attempts to implement and not to stultify international obligations.

After nearly a quarter of a century, the United Nations still lacks real teeth and it still remains true to say as I did then in 1946:—

The military agreements to give the Security Council means of enforcement action are subject to veto. None has yet been made between any Member of the United Nations and the Security Council. Until it has ratified such an agreement, each state remains free to refuse to do so: that is, to veto the military agreement proposed. Any state refusing to ratify an agreement might, of course, be expelled from the United Nations—subject to the veto being exercised in its favour.

B. A. WORTLEY

*Professor of Jurisprudence and  
International Law  
The University of Manchester*

## CONTEMPORARY PRACTICE OF THE UNITED STATES RELATING TO INTERNATIONAL LAW

The material for this section is compiled by Steven C. Nelson, attorney in the Office of the Legal Adviser, Department of State.

### TREATIES

#### *Convention on the Prevention and Punishment of the Crime of Genocide*

On February 19, 1970, President Nixon transmitted a message urging the Senate to give renewed consideration to the Convention and to grant its advice and consent to ratification. The Convention was originally transmitted to the Senate for its advice and consent to ratification by President Truman on June 16, 1949. Enclosed with President Nixon's message was the following report from the Secretary of State.

DEPARTMENT OF STATE,  
*Washington, February 5, 1970*

THE PRESIDENT: I respectfully recommend that you request the Senate of the United States to give its advice and consent to United States ratification of the Convention on the Prevention and Punishment of the Crime of Genocide. The text of the Convention is enclosed.<sup>1</sup> I believe that ratification is in the interests of the United States and that there is no constitutional obstacle to ratification. I am pleased to report that the Attorney General agrees that there are no constitutional obstacles to United States ratification.

The Convention was adopted unanimously by the General Assembly of the United Nations on December 9, 1948, and signed by the United States two days later. It was submitted to the Senate by President Truman on June 16, 1949 (Executive O, 81st Congress, 1st Session). Hearings were held in 1950 by a Subcommittee of the Foreign Relations Committee which reported it favorably to the full Committee. Neither the Committee nor the Senate as a whole has yet taken action on the Convention.

The Convention entered into force on January 12, 1951. So far seventy-four countries have become parties. It is anomalous that the United States, which firmly opposes the crime of genocide and which played a leading role in bringing about the recognition of genocide as a crime against international law, is not among the parties to the Convention.

Genocide has been perpetrated many times throughout history. Although man has always expressed his horror at this crime, little was done to prevent

<sup>1</sup> For text of Genocide Convention, see 62 Dept. of State Bulletin 352 (1970); 45 A.J.I.L. Supp. 7 (1951).

or punish it before the 1930's. World War II witnessed the most drastic series of genocidal acts ever committed. The revulsion of civilized society manifested itself in a United Nations General Assembly resolution of December 11, 1946, declaring genocide to be a crime under international law and recommending international cooperation in its prevention and punishment. This resolution was the impetus for the drafting of the Convention on the Prevention and Punishment of the Crime of Genocide.

The Convention provides in Article II that any of the following five acts, if accompanied by the intent to destroy, in whole or in part, a national, ethnical, racial, or religious group, constitutes the crime of genocide.

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group; and
- (e) Forcibly transferring children of the group to another group.

In addition to genocide itself, the Convention provides that conspiracy, attempt and direct and public incitement to commit genocide, and complicity in genocide shall be punishable.

In requesting Senate advice and consent to ratification, I recommend that you suggest an understanding to make clear that the United States Government understands and construes the words "mental harm" appearing in Article II(b) of this Convention to mean permanent impairment of mental faculties.

The contracting parties undertake to enact legislation necessary to give effect to the provisions of the Convention "in accordance with their respective constitutions." It is clear, therefore, that the Convention was not expected to be self-executing. I do not recommend, however, that the Executive Branch propose any specific implementing legislation at this time. The Departments of State and Justice will be prepared to discuss this question should the Congress request our views.

Persons charged with genocide would be tried by a competent tribunal of the state in whose territory the act was committed. Parties to the Convention are bound to grant extradition, in accordance with their laws and treaties, of persons charged with crimes falling under the Convention. Genocide is not to be considered a political crime for the purposes of extradition.

Disputes regarding the interpretation, application or fulfillment of the Convention shall be submitted to the International Court of Justice. In addition, any contracting party may call on competent organs of the United Nations to take such action under the United Nations Charter as they consider appropriate toward the prevention and suppression of acts of genocide or any of the related accessorial acts.

I am convinced that the American people together with all the peoples of the world will hail United States ratification of this Convention as a concrete example of our dedication to safeguarding human rights and basic freedoms.

Respectfully submitted,

WILLIAM P. ROGERS

(Senate Exec. B, 91st Cong., 2d Sess.; 62 Dept. of State Bulletin  
351 (1970).)

*Treaty Obligations of the United States Regarding Marijuana*

In reply to several inquiries received regarding treaty obligations of the United States regarding marijuana, the Department of State has called attention to the provisions of the Single Convention on Narcotic Drugs, 1961,<sup>1</sup> as follows:

The Single Convention requires the enforcement of controls on the cultivation, production, manufacture, export and import of, trade in, possession and use of marijuana which, as a whole, are similar to the controls required with respect to opium, the coca leaf and their derivatives, as outlined below.

"Marijuana" is not specifically mentioned in the Single Convention but it is covered by the references therein to cannabis. "Cannabis", "cannabis plant", and "cannabis resin" are defined in subparagraphs (b), (c), and (d) of paragraph 1 of Article 1 of the Convention. In addition to the specific references to cannabis in the Convention (Art. 1 (1) (b), (c), (d), (i), and (t); Art. 2(6) and (7); Art. 22; Art. 28; and Art. 49) and in Schedules I and IV to the Convention, cannabis is, by reason of its inclusion in Schedule I, covered by the word "drug" under the provisions of subparagraph (j) of paragraph 1 of Article 1 as follows:

"(j) 'Drug' means any of the substances in Schedules I and II, whether natural or synthetic."

With respect to the controls required by the Convention for cannabis and other drugs in Schedule I, attention is invited to the provisions of Article 2, particularly paragraphs 1, 6, 7 and 9.

Subject to the exception specified in paragraph 9 of Article 2 with respect to drugs commonly used in industry for other than medical or scientific purposes, the Parties to the Convention are required with respect to the drugs in Schedule I, which include marijuana, to apply all measures of control applicable to drugs under the Convention, except for those measures limited to specified drugs, and in particular to limit exclusively to medical and scientific purposes their production, manufacture, export, import, distribution of, trade in, use and possession (Art. 4(c)); to furnish each year

<sup>1</sup> The Convention entered into force with respect to the United States on June 24, 1967. Accession was advised by the Senate on May 8, 1967, was approved by the President on May 15, 1967, and the United States instrument of accession was deposited with the Secretary General of the United Nations on May 25, 1967. For text of the Convention see T.I.A.S., No. 6298; 520 U.N. Treaty Series 204.

to the International Narcotics Control Board estimates of drug requirements (Art. 19); to furnish the Board statistical returns each year on the amounts of drugs produced, manufactured, utilized for the manufacture of other drugs or preparations and substances, consumed, imported, exported, in stock and seized (Art. 20); to limit the amounts manufactured or imported (Art. 21); to prohibit cultivation whenever prevailing conditions in a country, in the opinion of that country, render such prohibition the most suitable measure for protecting the public health and welfare and to prevent diversion into the illicit traffic (Art. 22); to apply the system of controls as specified in Article 23 to the cultivation of the cannabis plant except where such cultivation is exclusively for industrial or horticultural purposes (Art. 28); to require that manufacture, trade and distribution be under license and that medical prescriptions be required for the supply or dispensation of drugs to individuals, except with respect to drugs individuals may lawfully obtain, use, dispense or administer in connection with their duly authorized therapeutic functions (Arts. 29 and 30); to refrain from knowingly permitting export of drugs to any country or territory except in accordance with its laws and regulations and within the limits of the total of the estimates for that country and to require import and export authorizations for each import or export (Art. 31); to establish safeguards to prevent improper use of drugs carried by ships or aircraft for first-aid or emergency purposes (Art. 32); to prohibit possession except under legal authority (Art. 33); to require that licensed persons shall have adequate qualifications for the effective and faithful execution of the provisions of such laws and regulations as are enacted in pursuance of the Convention (Art. 34); and to seize and confiscate drugs cultivated, produced, manufactured, possessed, offered for sale, distributed, purchased, transported, exported or imported contrary to law (Art. 37).

The inclusion of cannabis and cannabis resin in Schedule IV of the Convention also requires that marijuana be subjected to all the controls that apply to Schedule I drugs and to the controls specified in paragraph 5 of Article 2.

(Correspondence on file in the Office of the Legal Adviser,  
Department of State.)

#### LAW OF THE SEA

##### *International Law and the Oceans*

[John R. Stevenson, Legal Adviser of the Department of State, delivered the following address on February 18, 1970, before the Philadelphia World Affairs Council and the Philadelphia Bar Association.]

International law serves a variety of classic functions in the affairs of nations, all related to the maintenance of peace and a reasonable degree of stability:

First, prevention of conflict: To the extent that nations have similar views of their respective rights and obligations, the possibilities for conflict are reduced.



Second, security: This might as easily be termed predictability—the ability to foresee what activities can be undertaken with reasonable assurance that foreign states will acquiesce, albeit reluctantly.

Third, accommodation of interests: Both customary and conventional international law can be said to represent an equilibrium of different, sometimes conflicting, interests. This is perhaps the most dynamic function of the law. As the balance of real or perceived interests changes, either the law must be adapted or it will cease to perform any of its functions.

To these functions one must add two increasingly important functions of modern international law beyond the classic objective of stability:

First, promotion of common or community objectives: Here we arrive at the very frontiers of the scope of international law—the protection of human rights, the promotion of economic development, the devotion of economic resources to peaceful purposes. President Nixon himself has highlighted another of these common objectives of profound importance—the need to assure that the environment of this planet remains hospitable to human life and activities.

Second, providing guideposts on matters heretofore dealt with on a strictly bilateral basis: The dramatic increase in the size of the international community in recent years has increased the need to deal with many problems on a broad multilateral basis in order to avoid a complex web of different, perhaps inconsistent, arrangements with essentially the same purpose.

Against these criteria I propose to measure the general state of the law of the sea, a body of rules governing the activities of men and nations on 70 percent of this planet.

The origins of the modern law of the sea are intricately tied to the origins of modern international law as a whole. Grotius himself, the father of modern international law, proclaimed the fundamental premise of the law of the sea: the freedom of the seas. His reasoning contains within it an adumbration of our problems with the law of the sea today. He wrote:

All property is grounded upon occupation which requires that movables shall be seized and immovable things will be enclosed; whatever therefore cannot be so seized or enclosed is incapable of being made a subject of property. The vagrant waters of the ocean are thus necessarily free.

This passage suggests that the freedom of the seas rests on the fact that nations are physically incapable of exercising the same type of dominion over the oceans as they do on land. I submit that this is not true today and it was not entirely true even in Grotius' day. First, what Grotius said is equally applicable in practice to vast areas of the earth's land surface—deserts, polar regions, hostile and largely impenetrable jungles, and even major rivers. Second, major maritime powers have been in a position to exercise compelling dominion over large areas of the sea for thousands of

years. As recently as the 19th century the legal principle of freedom of the seas was a keystone of Great Britain's foreign policy, but in terms of the military power to control the seas, Britannia ruled the waves.

### *Legal Jurisdiction Over the Seas*

There are in fact three major alternatives regarding legal jurisdiction over the seas.

The first is a prohibition on national jurisdiction, with all enjoying equal rights to use the area with reasonable regard for each other's rights. This is the classic principle of freedom of the seas.

The second is control based on the physical power to exclude or regulate others. Thus, dominant maritime powers would develop marine empires similar to their land empires. For example, at the beginning of the 17th century large areas of the sea surrounding Europe were claimed by coastal states—the Adriatic, by Venice; the Baltic, by Denmark and Sweden; the Channel, the North Sea, and the seas off Ireland, by England.

The third is the division of the seas among nations in accordance with an agreed formula. The most likely formula would be relative proximity to the coast—with each coastal nation exercising dominion over all areas which are closer to its own coast than to the coast of any other nation.

I will exclude the second alternative—jurisdiction based on power to control—for three basic reasons. First, it is not seriously advocated by anyone these days. Second, when attempted in earlier times, it has not worked for long. Third, since it is based on relative maritime power, it is inherently unstable and inevitably invites direct military confrontation.

The first and third alternatives—freedom of the seas and coastal state jurisdiction over areas off its coast—are the major elements in the law of the sea today. It can be said that there is general, and probably universal, agreement that the coastal state's sovereignty extends to a limited belt of water, including the seabed and airspace, adjacent to its coast, called the territorial sea. It is also generally recognized that the coastal state has special competence over certain matters beyond its territorial sea. The most significant example would be its exclusive sovereign rights to explore and exploit the natural resources of the continental shelf adjacent to its coast. The 1958 Convention on the Territorial Sea recognizes certain specific law enforcement powers of the coastal state in a contiguous zone adjacent to its territorial sea, which may not exceed 12 miles from the coast, or baseline from which the territorial sea is measured. The overwhelming majority of states exercise exclusive fisheries jurisdiction up to 12 miles from their coast, either by virtue of a 12-mile territorial sea claim embracing such jurisdiction or by specific creation of a contiguous fisheries zone, as in the European Fisheries Convention and U.S. domestic legislation.

### *Breadth of the Territorial Sea*

In 1958 the international community completed an impressive codification of the law of the sea which resulted in four law of the sea conventions: on the territorial sea and contiguous zone, the high seas, the continental shelf,

and fishing and conservation of living resources of the high seas.<sup>1</sup> However, these conventions did not resolve the question of the breadth of the territorial sea or the precise outer limit of the continental shelf. With respect to the former question a second, unsuccessful, conference was held in 1960, at which a U.S. compromise proposal of a 6-mile territorial sea and an additional 6-mile exclusive fishery zone failed by one vote to obtain the necessary two-thirds majority. The United States has consequently adhered to the traditional position that 3 miles is the maximum breadth of the territorial sea. It has accepted a 12-mile exclusive fisheries zone in view of the overwhelming practice of states but does not recognize coastal state jurisdiction over fisheries beyond that limit.

While no state, in our view, is obliged to recognize territorial seas exceeding 3 miles, there is nothing like uniform agreement on this figure. About 30 states claim 3 miles, another 15 between 4 and 10 miles, and about 40 claim 12 miles. Approximately 11 states claim some sort of jurisdiction over the waters beyond 12 miles, usually fisheries jurisdiction but in some cases full territorial jurisdiction as far out as 200 miles.

Given this state of affairs, it can readily be seen, as the President pointed out in his foreign policy message to Congress today, that it is urgent that international agreement be reached on the breadth of the territorial sea to head off the threat of escalating national claims over the ocean.<sup>2</sup>

In the course of the last 2 years the United States has consulted with a large number of nations regarding the desirability of making a new attempt to achieve widespread agreement on the breadth of the territorial sea and has accelerated the pace of these discussions in the last year.

It appears that there is widespread support for fixing the breadth of the territorial sea at 12 nautical miles. However, the extension of the territorial sea to 12 miles would place many important international straits, which with a 3-mile limit have high seas areas running through them, within the territorial sea of the coastal state. This would mean that vessels could only traverse these straits in innocent passage; furthermore, there is no established right of innocent passage for aircraft in the airspace over straits within territorial waters. In the view of many countries this is not a satisfactory situation. The freedom of the seas would have a far more restrictive meaning indeed if rights to traverse straits are not clear and secure. A significant number of nations agree that this problem requires solution if a 12-mile territorial sea is to be accepted.

An additional problem directly affected by the breadth of the territorial sea is the conduct of high seas fisheries. Many nations do not believe that mere conservation of such fisheries adequately protects their interests. Large and mobile high seas fleets can move in on an area, seriously overfish the stocks, and move on. This can result in economic dislocations in a

<sup>1</sup> For texts of the conventions, see Dept. of State Bulletin of June 30, 1958, p. 1111; 52 A.J.I.L. 834 (1958).

<sup>2</sup> The complete text of President Nixon's foreign policy report to the Congress on Feb. 18 is printed in the Bulletin of March 9, 1970; the section entitled "United Nations" begins on p. 313.

coastal state, or a region thereof, which is dependent on such fisheries for its livelihood. We believe these economic pressures have contributed significantly to the trend toward expanded unilateral jurisdictional claims and that many nations will insist that these problems be dealt with in conjunction with agreement on the breadth of the territorial sea.

As a result of our consultations we believe the time is right for the conclusion of a new international treaty fixing the limitation of the territorial sea at 12 miles and providing for freedom of transit through and over international straits and carefully defined preferential fishing rights for coastal states on the high seas. We intend to work closely with the many other nations who share our views in these matters at the U.N. this fall as a matter of high priority.

#### *International Regime for the Seabed*

I mentioned earlier that the 1958 Law of the Sea Conference also failed to establish a precise outer limit for the exercise of sovereign rights by the coastal state over the exploration and exploitation of the seabed. The Convention on the Continental Shelf defines the continental shelf as the adjacent areas of the seabed beyond the territorial sea to where the waters reach a depth of 200 meters or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the seabed and subsoil. The convention does not define what is meant by "adjacent" areas.

We are all aware of the promise of enormous wealth in the seabed. There is reason to believe that petroleum or gas deposits may exist in the continental margins off the coasts of all continents. These resources may well exceed those which exist on land. Despite differing attitudes on where the precise outer limit of the continental shelf should be, there appears to be virtually universal agreement that coastal state jurisdiction over the seabed does not extend out to the middle of the oceans. Some have proposed fixing a narrow permanent outer limit at the geological edge of the continental shelf, if this is deeper than 200 meters. Some continental shelves extend as deep as 550 meters. Others have advocated a wide limit embracing the entire continental margin: the continental shelf, the steep sloping area beyond called the continental slope, and the sedimentary deposits overlapping and extending beyond the foot of the continental slopes which are referred to as the continental rise. The depth of water at the outer edge of the rise varies from 2,500 meters to 4,000 meters. Still others have proposed to resolve this difficulty by devising an intermediate zone regime for the continental slope and rise.

Any of these approaches would leave vast areas of the seabed beyond the limits of national jurisdiction over resources. The U.N. General Assembly has established a Seabed Committee to consider the peaceful uses of this area. The United States has taken the position that an internationally agreed regime for exploitation of resources beyond national jurisdiction should be established as soon as practicable. While we believe that the general principles of the freedom of the seas do apply to this area,

we recognize that to assure a reasonable degree of stability and the promotion of common international objectives, broad agreement on an international regime, including a clear system of rules which will minimize the potential for conflict, is necessary.

The Secretary General of the United Nations has submitted a report to the Seabed Committee on various types of machinery which could be devised for regulating the exploitation of the resources of the seabed beyond national jurisdiction. At one end of the spectrum, agreed criteria would be established governing exploitation of these resources, with an international registry for claims made in accordance with these criteria. The registering state would have basic enforcement responsibilities. A second alternative would be an international licensing authority which would issue licenses in accordance with agreed criteria. At the far end of the spectrum would be an international organization with complete authority to undertake exploitation of seabed resources itself. As the Secretary General himself pointed out, these alternatives are more in the nature of benchmarks along a spectrum in which an infinite variety of modalities exists.

#### *Fundamental Decisions*

With the international community so deeply engaged in discussion of law of the sea, the question naturally arises as to whether or when a new international law of the sea conference or conferences should be held. The U.N. General Assembly has requested the Secretary General to inquire of member states whether a new conference should be held. In examining this matter, I believe three considerations are paramount:

First, the international community should look forward, not back. It achieved an impressive codification of the law of the sea in 1958. Its task now is to resolve the questions which were not resolved at that time and to address the new questions regarding the seabed which are posed by our rapidly expanding technology. Reopening the questions settled by the 1958 conventions would cause needless confusion and delay.

Second, we believe that rapid progress is only possible if the issues are treated in manageable packages. The 1958 comprehensive Geneva conference took almost a decade to prepare, in large measure because so many issues were being examined at the same time. The issues of the breadth of the territorial sea, straits, and fisheries are old ones which have been examined carefully by the international community in the past and are well understood. It seems to me they could be addressed as a single unit and resolved quickly. The formulation of a seabed regime involves many matters wholly new, not only to the law of the sea but to international law generally. Creative energies should be brought to bear on this matter without any dilution of attention.

Third, the international community must recognize that the entire issue of the seabed will be mooted unless there is agreement on the breadth of the territorial sea. The promise of an international regime for the seabed and the bold experiment in providing international revenues for interna-

tional community purposes will be shattered unless the nations of the world, acting as a unit, decide to protect their common interests from a chaotic pattern of coastal state claims.

The community of nations thus has before it a set of fundamental decisions regarding well over half of the earth. It must decide whether the clear rule of law rather than the force of arms will govern international relations on the seas. It must decide whether international cooperation for the benefit of all mankind or mystic national pride will dominate the oceans. In a most fundamental sense it must decide whether the order of the day is an accommodation of legitimate interests or a clash of positions.

The United States is prepared to lead the way toward a true internationalism in the oceans. We do this not only because of our ideals but because it is clear that this is the only way to assure that our own interests and the interests of all other nations are adequately accommodated. International law has reserved for us a vast area of high seas and a vast area of seabed beyond the limits of national jurisdiction—and thus with vast opportunities for bringing nations together to work toward common objectives. Whether in the next few years we take a step toward tying the world closer together or yield to misguided rhetoric will determine the course of events for a long time to come.

(Dept. of State Press Release No. 49, Feb. 18, 1970; 62 Dept. of State Bulletin 339 (1970).)

*United States Position on Limit of the Territorial Sea*

On February 25, 1970, the Department of State issued the following statement:

The United States Government has recently been discussing the question of the proper limit for territorial seas with many nations. Widespread disagreement on the proper breadth of the territorial sea makes it urgent that the community of nations attempt once again to fix a limit. The United States supports the 12-mile limit as the most widely accepted one, but only if a treaty can be negotiated which will achieve widespread international acceptance and will provide for freedom of navigation through and over international straits. At the same time the United States will attempt to accommodate the interests of coastal states in the fishery resources off their coasts.

The United States Government hopes this initiative will be successful. Until that objective is realized, the United States will continue to adhere to the position that it is not obliged to recognize territorial seas which exceed 3 miles.

(Dept. of State Press Release No. 64, Feb. 25, 1970; 62 Dept. of State Bulletin 343 (1970).)

CIVIL AVIATION

*Proposed changes in the Warsaw Convention as Amended at The Hague, 1955*

The Seventeenth Session of the Legal Committee of the International Civil Aviation Organization (ICAO) met from February 9 to March 11,

1970. Part of its work dealt with the subject of revision of the Warsaw Convention as Amended at The Hague, 1955. A problem of central concern to the United States in connection with the Convention has been the provision limiting the liability of carriers in international air transportation for passenger injury or death to a specified figure, which has been low in relation to standards of liability prevailing in the United States.<sup>1</sup> As a result of its deliberations, the Legal Committee drafted texts of certain articles with a view to the revision of the Convention. The draft was transmitted to the ICAO Council with a recommendation that it be submitted to a diplomatic conference for approval.<sup>2</sup> The following is the draft prepared by the Legal Committee:<sup>3</sup>

#### DRAFT TEXT

The texts of the several articles which appear on the following pages have been prepared by the Legal Committee with the understanding that:

- (1) the texts on the following pages pertain to the "single instrument" described in Article XIX of The Hague Protocol and known as the "Warsaw Convention as Amended at The Hague, 1955";
- (2) it is proposed that the following articles of the "Warsaw Convention as Amended at The Hague, 1955" be *deleted* and replaced by those articles which appear on the following pages with corresponding numbers:  
Articles 3, 17, 20, 21, 22, paragraph 1, subparagraphs (a), (b), (c), and paragraph 4, subparagraphs (a), (b), (c), 24, paragraph 2, 25 (delete), 25A, paragraph 3 (delete), 28; and
- (3) a "New Article" and "Another New Article," so described at the end of the following pages, be incorporated in the instrument of amendment of "The Warsaw Convention as Amended at The Hague, 1955."

#### Article 3

1. In respect of the carriage of passengers an individual or collective document of carriage shall be delivered containing:

- (a) an indication of the places of departure and destination;
- (b) if the places of departure and destination are within the territory of a single High Contracting Party, one or more agreed stopping places being within the territory of another State, an indication of at least one such stopping place.

2. Any other means which would preserve a record of the information indicated in (a) and (b) of the foregoing paragraph may be substituted for the delivery of the document referred to in that paragraph.

3. Non-compliance with the provisions of the foregoing paragraphs shall not affect the existence or the validity of the contract of carriage, which

<sup>1</sup> For a general history of United States experience in this connection, see Lowenfeld and Mendelsohn, "The United States and the Warsaw Convention," 80 Harvard Law Rev. 497 (1967).

<sup>2</sup> ICAO Legal Committee, Summary of Seventeenth Sess. 40, ICAO Doc. No. 8865-LC/159, Part III (1970).

<sup>3</sup> ICAO Legal Committee, Summary of Seventeenth Sess. 47, ICAO Doc. No. 8865-LC/159, Part III, Annex C (1970).

shall, none the less, be subject to the rules of this Convention including those relating to limitation of liability.

#### *Article 17*

The carrier is liable for damage sustained in case of death or personal injury of a passenger upon proof only that the event which caused the death or injury took place on board the aircraft or in the course of any of the operations of embarking or disembarking. However, the carrier is not liable if the death or injury resulted solely from the infirmity of the passenger.

#### *Article 19*

(No change)

#### *Article 20*

1. In the carriage of passengers the carrier shall not be liable for damage occasioned by delay if he proves that he and his servants and agents have taken all necessary measures to avoid the damage or that it was impossible for them to take such measures.

2. In the carriage of baggage and cargo the carrier shall not be liable for damage resulting from destruction, loss, damage or delay if he proves that he and his servants and agents have taken all necessary measures to avoid the damage or that it was impossible for them to take such measures.

#### *Article 21*

If the carrier proves that the damage was caused or contributed to by the negligence or other wrongful act or omission of the person claiming compensation, the carrier shall be wholly or partly exonerated from his liability to such person. When by reason of the death or injury of a passenger compensation is claimed by a person other than the passenger, the carrier shall likewise be wholly or partly exonerated from his liability if he proves that the damage was caused or contributed to by the negligence or other wrongful act or omission of that passenger.

#### *Article 22*

1. (a) In the carriage of persons the liability of the carrier for damage suffered in a case of death or personal injury is limited for each passenger to the sum of one million and five hundred thousand francs.<sup>1</sup> Where, in accordance with the law of the court seised of the case, damages may be awarded in the form of periodical payments, the equivalent capital value of the said payments shall not exceed one million and five hundred thousand francs.

(b) The sum mentioned in subparagraph (a) of this paragraph shall be increased every first of January starting in the year 197 . . . and ending in the year 198 . . . [on the first of January of each of the twelve years following the entry into force of this . . .] by an additional sum of thirty eight

<sup>1</sup> At the rate of U.S. \$35 per ounce of gold, this sum represents about \$100,000.



thousand francs.<sup>2</sup> The applicable limit shall be that which, in accordance with this paragraph, is in effect on the date of the event which caused the death or injury.

(c) In the case of delay in the carriage of persons the liability of the carrier for each passenger is limited to . . . francs.

. . . .

4. (a) The courts of the High Contracting Parties which are not authorized under their law to award the costs of the action, including an attorney's fee, shall, in actions to which this . . . applies, have the power, in their discretion, to award to the claimant the whole or part of the costs of the action, including an attorney's fee which the court considers reasonable. Any High Contracting Party whose courts are not authorized under its law to award such costs may deny its courts the power to award such costs under this. . . .

(b) The costs of the action including an attorney's fee shall be awarded [under the law of the court [or under subparagraph (a)]] only if the claimant gives a written notice to the carrier of the amount claimed including the particulars of the calculation of that amount and the carrier does not make, within a period of six months after his receipt of such notice, a written offer of settlement in an amount at least equal to the compensation awarded within the applicable limit. This period will be extended until the time of commencement of the action if that is later.

(c) The costs of the action including an attorney's fee awarded under the law of the court seised of the case or under subparagraph (a) shall not be taken into account in applying the limits under this Article.

#### *Article 24*

. . . .

2. In a case covered by Article 17 any action for damages, however founded, whether under this Convention or in contract or in tort or otherwise, can only be brought subject to the conditions and limits of liability set out in this Convention, without prejudice to the question as to who are the persons who have the right to bring suit and what are their respective rights.

#### *Article 25*

*Delete*

#### *Article 25A*

*Delete* paragraph 3.

#### *Article 28*

1. (No change).

2. In respect of damage resulting from the death, injury or delay of a passenger, the action may also be brought in the territory of one of the High Contracting Parties before the court where the carrier has an establish-

<sup>2</sup> At the rate of U.S. \$35 per ounce of gold, this sum represents about \$2,500.

ment if the passenger has his domicile or permanent residence in the territory of the same High Contracting Party.

3. (Present paragraph 2).

#### *New Article*

Nothing in this Convention shall prejudice the question whether a person liable for damage in accordance with its provisions has a right of recourse against any other person.

#### *Another New Article*

Without prejudice to the provisions of Article 41 of the Warsaw Convention a conference of the Parties to the present Convention shall be convened by . . . during the fifth and tenth years of the period established in paragraph 1(b) of Article 22 of the present Convention. The first of these conferences shall examine whether to amend the arrangement established in the said paragraph in respect of the periodic increase. The second conference shall decide whether to continue the system of periodic increase beyond the period indicated in paragraph 1(b) of Article 22.

#### *Unlawful Seizure of Aircraft*

Another subject of study by the ICAO Legal Committee at its Seventeenth Session was the problem of unlawful seizure of aircraft. The Committee prepared a draft convention on the subject which it transmitted to the ICAO Council with a recommendation that it be submitted to a diplomatic conference for approval.<sup>1</sup> The following is the draft prepared by the Committee:<sup>2</sup>

#### DRAFT CONVENTION

##### THE STATES PARTIES TO THIS CONVENTION

CONSIDERING that unlawful acts of seizure or exercise of control of aircraft in flight jeopardize the safety of persons and property, seriously affect the operation of international air services, and undermine the confidence of the peoples of the world in the safety of civil aviation;  
CONSIDERING that the occurrence of such acts is a matter of grave concern;  
CONSIDERING that for the purpose of deterring such acts, there is an urgent need to make them punishable as an offence and to provide for appropriate measures to facilitate prosecution and extradition of offenders;

CONSIDERING, in consequence, that it is necessary to adopt provisions additional to those of international agreements in force and in par-

<sup>1</sup> ICAO Legal Committee, Summary of the Seventeenth Sess. 27, ICAO Doc. No. 8865-LC/159, Part II (1970).

<sup>2</sup> ICAO Legal Committee, Summary of Seventeenth Sess. 31, ICAO Doc. No. 8865-LC/159, Part II, Annex B (1970).

ticular to those of the Convention signed at Tokyo on 14 September 1963 on Offences and Certain Other Acts Committed on Board Aircraft, HAVE AGREED AS FOLLOWS:

#### *Article 1*

Any person who on board an aircraft in flight:

(a) unlawfully, by force or threat thereof, or by any other form of intimidation, seizes or exercises control of that aircraft, or attempts to perform any such act, or

(b) is an accomplice of a person who performs or attempts to perform any such act, commits an offence (hereinafter referred to as "the offence").

#### *Article 2*

1. For the purposes of this Convention, an aircraft is considered to be in flight from the moment when power is applied for the purpose of take-off until the moment when the landing run ends.

2. This Convention shall not apply to aircraft used in military, customs or police services.

3. This Convention shall apply only if the place of take-off or the place of landing of the aircraft on board which the offence is committed is situated outside the territory of the State of registration of that aircraft.

4. In the cases mentioned in Article 5 this Convention shall not apply if the place of take-off and the place of landing of the aircraft on board which the offence is committed are situated within the territory of the same State where that State is one of those referred to in that Article.

#### *Article 3*

Each Contracting State undertakes to make the offence punishable by severe penalties.

#### *Article 4*

1. Each Contracting State shall take such measures as may be necessary to establish its jurisdiction over the offence in the following cases:

(a) when the offence is committed on board an aircraft registered in that State;

(b) when the aircraft lands in its territory with the alleged offender still on board.

2. This Convention does not exclude any criminal jurisdiction exercised in accordance with national law.

#### *Article 5*

The Contracting States which establish joint air transport operating organizations or international operating agencies, which operate aircraft which are subject to joint or international registration shall, by appropriate means, designate for each aircraft the State among them which shall exercise the jurisdiction and have the attributes of the State of registra-

tion for the purposes of this Convention and shall give notice thereof to the International Civil Aviation Organization which shall communicate the notice to all States Parties to this Convention.

#### *Article 6*

1. Upon being satisfied that the circumstances so warrant, any Contracting State in the territory of which the alleged offender is present, shall take him into custody or take other measures to ensure his presence. The custody and other measures shall be as provided in the law of that State but may only be continued for such time as is reasonably necessary to enable any criminal or extradition proceedings to be instituted.

2. Such State shall immediately make a preliminary enquiry into the facts.

3. Any person in custody pursuant to paragraph 1 shall be assisted in communicating immediately with the nearest appropriate representative of the State of which he is a national.

4. When a State, pursuant to this Article, has taken a person into custody, it shall immediately notify the State of registration of the aircraft and the State of nationality of the detained person and, if it considers it advisable, any other interested States of the fact that such person is in custody and of the circumstances which warrant his detention. The State which makes the preliminary enquiry contemplated in paragraph 2 of this Article shall promptly report its findings to the said States and shall indicate whether it intends to exercise jurisdiction.

#### *Article 7*

The Contracting State which has taken measures pursuant to Article 6, paragraph 1 shall, if it does not extradite the alleged offender, be obliged to submit the case to its competent authorities for their decision whether to prosecute him. These authorities shall take their decision in the same manner as in the case of other offences.

#### *Article 8*

1. The offence shall be deemed to be included as an extraditable offence in any extradition treaty existing between Contracting States. Contracting States undertake to include the offence as an extraditable offence in every extradition treaty to be concluded between them.

2. The Contracting States which do not make extradition conditional on the existence of a treaty shall recognize the offence as an extraditable offence between themselves subject to the conditions established by the law of the State requested to extradite.

3. The offence shall be treated, for the purpose of extradition between Contracting States, as if it had been committed not only in the place in which it occurred but also in the territory:

- (a) of the State of registration of the aircraft;
- (b) of every State in which the aircraft lands with the alleged offender still on board.

*Article 9*

1. When any of the acts mentioned in Article 1 (a) has occurred or is about to occur, Contracting States shall take all appropriate measures to restore control of the aircraft to its lawful commander or to preserve his control of the aircraft.

2. In the cases contemplated in the preceding paragraph, the Contracting State in which the aircraft lands shall permit its passengers and crew to continue their journey as soon as practicable, and shall return the aircraft and its cargo to the persons lawfully entitled to possession.

*Article 10*

Contracting States shall, in accordance with the applicable law, afford one another the greatest measure of assistance in connection with proceedings brought in respect of the offence.

## TERRITORIAL MATTERS

*Preparations for the Reversion of Okinawa*

Through an exchange of notes, the United States and Japan agreed upon procedures relating to preparations for the return to Japan of administrative rights over Okinawa. The text of the United States note was as follows:

*Tokyo, March 3, 1970*

Excellency:

I have the honor to acknowledge receipt of Your Excellency's note of today's date, which reads in the English translation thereof as follows:

"I have the honour to refer to paragraph 10 of the Joint Communiqué issued on November 21, 1969 in Washington following talks between Prime Minister Sato and President Nixon, in which the Prime Minister and the President, recognizing the complexity of the problems involved in the reversion of Okinawa, agreed that the two Governments should consult closely and cooperate on the measures necessary to assure a smooth transfer of administrative rights to the Japanese Government in accordance with reversion arrangements to be agreed to by both Governments. They agreed that the Japan-United States Consultative Committee in Tokyo should undertake overall responsibility for this preparatory work, and they decided to establish in Okinawa a Preparatory Commission for the purpose of consulting and coordinating locally on measures relating to preparation for the transfer of administrative rights, including necessary assistance to the Government of the Ryukyu Islands.

"I wish to confirm on behalf of the Government of Japan the following understandings reached between the two Governments concerning the consultation and coordination which the two Governments, seeking further to promote the welfare and interests of the inhabitants of Okinawa, are to undertake on the preparations for the return of

the administrative rights over Okinawa to Japan, including the measures necessary in laying strong foundations for the Okinawa Prefecture to be established at the time of reversion and local preparatory work as necessary to facilitate the application to Okinawa of the Status of Forces Agreement.

"1. The functions of the Japan-United States Consultative Committee, as set forth in paragraph 2 of the Exchange of Notes of April 25, 1964, and as broadened by the Exchange of Notes of April 2, 1965, are hereby further expanded so that the Committee will undertake overall responsibility for the preparations for reversion and accordingly coordinate the basic policies of the two Governments in respect thereof, and will establish principles and guidelines for these preparations.

"2. (1) A Preparatory Commission (hereinafter referred to as 'the Commission') is hereby established in Naha as the sole official channel for local consultation and coordination between the two Governments on specific measures necessary for the carrying out of the preparations for reversion. The Commission shall function according to principles and guidelines established by the Consultative Committee.

(a) The Commission will be composed of a representative of the Government of Japan with ambassadorial rank and the High Commissioner of the Ryukyu Islands as representative of the Government of the United States, respectively supported by appropriate staff, which will include one alternate representative.

(b) The Chief Executive of the Government of the Ryukyu Islands will participate in the commission as adviser to represent the views of the Government of the Ryukyu Islands. The Chief Executive will be supported by an appropriate staff, which will include one alternate adviser.

(2) The main functions of the Commission will be as follows:

(a) To decide, in accordance with the principles and guidelines established under paragraph 1 above, on the measures for the preparations for reversion to be taken locally as well as on implementation schedules of such measures;

(b) To undertake necessary surveys and studies in connection with (a) above;

(c) To formulate recommendations as necessary to the two Governments on the preparations for reversion; and to report from time to time on its activities under (a) and (b) above. Such recommendations and reports will be made through the Consultative Committee.

(3) The Commission may establish subcommittees as necessary.

(4) Each Government will defray support expenses for its representative, alternate representative, and supporting staff. Based on prior approval of the two Governments, common costs related to the activ-

ities of the Commission will be shared by them according to proportions to be agreed upon, subject to availability of appropriated funds.

"3. In carrying out the above-mentioned consultation and cooperation, the two Governments will take into full consideration the interests of the inhabitants of Okinawa and the views of the Government of the Ryukyu Islands and, in order to achieve speedy and effective implementation of the preparations for reversion, will take appropriate measures, including necessary cooperation with the Government of the Ryukyu Islands, in accordance with the relevant laws and regulations of the respective countries.

"4. The Advisory Committee to the High Commissioner of the Ryukyu Islands established under the Exchange of Notes of January 19, 1968 will be abolished at the earliest possible date to be agreed to by the two Governments.

"I would appreciate it if Your Excellency would confirm on behalf of your Government that the foregoing is also the understanding of your Government and the Government of the Ryukyu Islands has no objection thereto and that the present note and Your Excellency's reply constitute an agreement between our two Governments.

"I avail myself of this opportunity to renew to Your Excellency the assurance of my highest consideration."

I have the honor to confirm on behalf of my Government that the foregoing is also the understanding of my Government and the Government of the Ryukyu Islands has no objection thereto and that Your Excellency's note and the present note in reply constitute an agreement between our two Governments.

I avail myself of this opportunity to renew to Your Excellency the assurance of my highest consideration.

ARMIN H. MEYER

His Excellency  
Kiichi Aichi,  
Minister for Foreign Affairs,  
Tokyo.

(T.I.A.S., No. 6838.)

#### EXTRADITION

*Executive Order 11517, Providing for the Issuance and Signature by the Secretary of State of Warrants Appointing Agents to Return Fugitives from Justice Extradited to the United States*

WHEREAS the President of the United States, under section 3192 of Title 18, United States Code, has been granted the power to take all necessary measures for the transportation, safe-keeping and security against lawless violence of any person delivered by any foreign government to an agent of the United States for return to the United States for trial for any offense of which he is duly accused; and

WHEREAS fugitives from justice in the United States whose extradition from abroad has been requested by the Government of the United States and granted by a foreign government are to be returned in the custody of duly appointed agents in accordance with the provisions of section 3193 of Title 18, United States Code; and

WHEREAS such duly appointed agents under the provisions of the law mentioned above, being authorized to receive delivery of the fugitive in behalf of the United States and to convey him to the place of his trial, are given the powers of a marshal of the United States in the several districts of the United States through which it may be necessary for them to pass with such prisoner, so far as such power is requisite for the prisoner's safekeeping; and

WHEREAS such warrants serve as a certification to the foreign government delivering the fugitives to any other foreign country through which such agents may pass, and to authorities in the United States of the powers therein conferred upon the agents; and

WHEREAS it is desirable by delegation of functions heretofore performed by the President to simplify and thereby expedite the issuance of such warrants to agents in the interests of the prompt return of fugitives to the United States:

NOW, THEREFORE, by virtue of the authority vested in me by section 301 of Title 3 of the United States Code, and as President of the United States, it is ordered as follows:

SECTION 1. The Secretary of State is hereby designated and empowered to issue and sign all warrants appointing agents to receive, in behalf of the United States, the delivery in extradition by a foreign government of any person accused of a crime committed within the United States, and to convey such person to the place of his trial.

SEC. 2. Agents appointed in accordance with section 1 of this order shall have all the powers conferred in respect of such agents by applicable treaties of the United States and by section 3193 of Title 18, United States Code, or by any other provisions of United States law.

SEC. 3. Executive Order No. 10347, April 18, 1952, as amended by Executive Order No. 11354, May 23, 1967, is further amended by deleting numbered paragraph 4 and renumbering paragraphs 5 and 6 as paragraphs 4 and 5, respectively.

RICHARD NIXON

THE WHITE HOUSE,

March 19, 1970

(35 Fed. Reg. 4937 (1970).)

#### SOVEREIGN IMMUNITY

[The following excerpt is based on a letter sent by the Office of the Legal Adviser, Department of State, on February 9, 1970, in response to a request for information concerning the procedures followed by the Department of State in considering requests from foreign governments for assistance in asserting claims of sovereign immunity in litigation in United States courts:]



You have asked several questions in your letter about the procedure followed by the Department of State in sovereign immunity matters. The following description of our procedure is organized to correspond to the specific questions you have asked.

- a) What should be the contents of a note or memorandum? To whom should it be addressed?

Under our established practice, when a foreign government seeks the assistance of the Department of State in advancing a claim of sovereign immunity, the government's embassy addresses a communication to the Secretary of State or the Department of State setting forth the name of the case in which the Department's assistance is requested and the extent of immunity claimed by the foreign government. The communication is generally accompanied by a memorandum setting forth the relevant facts in the case and arguments in support of a conclusion that the government is entitled to immunity. The Department is concerned solely with the question whether a basis for sovereign immunity exists under the restrictive theory of sovereign immunity as set forth in the Tate letter of May 1952 and not with the merits of the underlying litigation.\*

- b) Would a copy of this note be given to the other party to the suit or case?

When a request for assistance in asserting immunity is received by the Department of State, the Department notifies the plaintiff in the litigation of the receipt of the request and sends to the plaintiff a copy of the government's memorandum, if the government has not previously done so. The plaintiff is informed that the Department will take into consideration any views he may wish to present concerning the immunity request. In addition, he is informed that the Department, at the request of either party, will schedule a hearing to permit oral presentation on the matter. As a general rule, the Department wishes to apprise the plaintiff of all arguments made by the foreign government in support of its request for assistance.

- c) What would be the nature of the hearing?

When either party requests an opportunity to make an oral presentation concerning the immunity request, the Department schedules a hearing which representatives of both parties may attend to present their views.

The hearing is informal in nature. It is conducted by a panel usually composed of the Legal Adviser or a Deputy Legal Adviser and two Assistant Legal Advisers. As a general practice, thirty minutes is allowed each side for principal argument and ten minutes for rebuttal. However, the time of presentation is often extended somewhat due to questions asked by members of the panel. Presen-

\* For the Tate letter of May 19, 1952, see 26 Dept. of State Bulletin 984 (June 23, 1952), commented on in 47 A.J.I.L. 93 (1953).

tation is solely by representatives of the parties, and no witness testimony is introduced.

- d) Would the note and the proceedings of the hearing be privileged or would they be made available to the court?

The hearing is not closed, and it might be attended by representatives from other interested federal agencies. In keeping with the informal nature of the hearing, no transcript is made of the proceedings. However, the memoranda submitted by the parties and the oral arguments presented at the hearing are taken into consideration by the Department in preparing its reply to the embassy's request for assistance in asserting sovereign immunity. A copy of the Department's reply to the embassy is made available to the plaintiff's representative, and, when the Department has concluded that there is a basis for a grant of immunity, the substance of the reply is transmitted to the court through the Department of Justice, together with a statement by the Justice Department indicating the position of the United States.

## JUDICIAL DECISIONS

ALONA E. EVANS

### *Claim of stockholders for allegedly unlawful measures against corporation of third state*

CASE CONCERNING THE BARCELONIA TRACTION, LIGHT AND POWER COMPANY, LIMITED (BELGIUM *v.* SPAIN), SECOND PHASE.<sup>1</sup> I.C.J. Reports, 1970, p. 3.

International Court of Justice.<sup>2</sup> Judgment of Feb. 5, 1970.

1. In 1958 the Belgian Government filed with the International Court of Justice an Application against the Spanish Government seeking reparation for damage allegedly caused to the Barcelona Traction, Light and Power Company, Limited, on account of acts said to be contrary to international law committed by organs of the Spanish State. After the filing of the Belgian Memorial and the submission of preliminary objections by the Spanish Government, the Belgian Government gave notice of the discontinuance of the proceedings, with a view to negotiations between the representatives of the private interests concerned. The case was removed from the Court's General List on 10 April 1961.

2. On 19 June 1962, the negotiations having failed, the Belgian Government submitted to the Court a new Application, claiming reparation for the damage allegedly sustained by Belgian nationals, shareholders in the Barcelona Traction company, on account of acts said to be contrary to international law committed in respect of the company by organs of the Spanish State. On 15 March 1963 the Spanish Government raised four preliminary objections to the Belgian Application.

3. By its Judgment of 24 July 1964,<sup>3</sup> the Court rejected the first two preliminary objections. The first was to the effect that the discontinuance, under Article 69, paragraph 2, of the Court's Rules, of previous proceedings relative to the same events in Spain, disentitled the Belgian Government from bringing the present proceedings. The second was to the effect that even if this was not the case, the Court was not competent, because the necessary jurisdictional basis requiring Spain to submit to the jurisdiction of the Court did not exist. The Court joined the third and fourth objections to the merits. The third was to the effect that the claim

<sup>1</sup> Excerpted and digested by Wm. W. Bishop, Jr.

<sup>2</sup> Consisting for this case of President Bustamante y Rivero; Vice-President Koretsky; Judges Fitzmaurice, Tanaka, Jessup, Morelli, Padilla Nervo, Forster, Gros, Ammoun, Bengzon, Petén, Lachs, and Onyeama; and Judges *ad hoc* Armand-Ugon (Uruguayan selected by Spain) and Riphagen (Netherlander selected by Belgium). Judge Sir Muhammad Zafrulla Khan refrained from participating in the decision since he had been consulted concerning the case by one of the parties prior to his election to the Court.

<sup>3</sup> I.C.J. Reports, 1964, p. 6; excerpted in 59 A.J.I.L. 131 (1965).

is inadmissible because the Belgian Government lacks any *jus standi* to intervene or make a judicial claim on behalf of Belgian interests in a Canadian company, assuming that the Belgian character of such interests were established, which is denied by the Spanish Government. The fourth was to the effect that even if the Belgian Government has the necessary *jus standi*, the claim still remains inadmissible because local remedies in respect of the acts complained of were not exhausted.

\* \* \* \* \*

8. The Barcelona Traction, Light and Power Company, Limited, is a holding company incorporated in 1911 in Toronto (Canada), where it has its head office. For the purpose of creating and developing an electric power production and distribution system in Catalonia (Spain), it formed a number of operating, financing and concession-holding subsidiary companies. Three of these companies, whose shares it owned wholly or almost wholly, were incorporated under Canadian Law and had their registered offices in Canada (Ebro Irrigation and Power Company, Limited, Catalanian Land Company, Limited and International Utilities Finance Corporation, Limited); the others were incorporated under Spanish law and had their registered offices in Spain. At the time of the outbreak of the Spanish civil war the group, through its operating subsidiaries, supplied the major part of Catalonia's electricity requirements.

9. According to the Belgian Government, some years after the first world war Barcelona Traction's share capital came to be very largely held by Belgian nationals—natural or juristic persons—and a very high percentage of the shares has since then continuously belonged to Belgian nationals, particularly the Société Internationale d'Énergie Hydro-Électrique (Sidro), whose principal shareholder, the Société Financière de Transports et d'Entreprises Industrielles (Sofina), is itself a company in which Belgian interests are preponderant. The fact that large blocks of shares were for certain periods transferred to American nominees, to protect these securities in the event of invasion of Belgian territory during the Second World War, is not, according to the Belgian contention, of any relevance in this connection, as it was Belgian nationals, particularly Sidro, who continued to be the real owners. For a time the shares were vested in a trustee, but the Belgian Government maintains that the trust terminated in 1946. The Spanish Government contends, on the contrary, that the Belgian nationality of the shareholders is not proven and that the trustee or the nominees must be regarded as the true shareholders in the case of the shares concerned.

10. Barcelona Traction issued several series of bonds, some in pesetas but principally in sterling. The issues were secured by trust deeds, with the National Trust Company, Limited, of Toronto as trustee of the sterling bonds, the security consisting essentially of a charge on bonds and shares of Ebro and other subsidiaries and of a mortgage executed by Ebro in favour of National Trust. The sterling bonds were serviced out of transfers

to Barcelona Traction effected by the subsidiary companies operating in Spain.

11. In 1936 the servicing of the Barcelona Traction bonds was suspended on account of the Spanish civil war. In 1940 payment of interest on the peseta bonds was resumed with the authorization of the Spanish exchange control authorities (required because the debt was owed by a foreign company), but authorization for the transfer of the foreign currency necessary for the servicing of the sterling bonds was refused and those interest payments were never resumed.

12. In 1945 Barcelona Traction proposed a plan of compromise which provided for the reimbursement of the sterling debt. When the Spanish authorities refused to authorize the transfer of the necessary foreign currency, this plan was twice modified. In its final form, the plan provided *inter alia* for an advance redemption by Ebro of Barcelona Traction peseta bonds, for which authorization was likewise required. Such authorization was refused by the Spanish authorities. Later, when the Belgian Government complained of the refusals to authorize foreign currency transfers, without which the debts on the bonds could not be honoured, the Spanish Government stated that the transfers could not be authorized unless it was shown that the foreign currency was to be used to repay debts arising from the genuine importation of foreign capital into Spain, and that this had not been established.

13. On 9 February 1948 three Spanish holders of recently acquired Barcelona Traction sterling bonds petitioned the court of Reus (Province of Tarragona) for a declaration adjudging the company bankrupt, on account of failure to pay the interest on the bonds. The petition was admitted by an order of 10 February 1948 and a judgment declaring the company bankrupt was given on 12 February. This judgment included provisions appointing a commissioner in bankruptcy and an interim receiver and ordering the seizure of the assets of Barcelona Traction, Ebro and Compañía Barcelonesa de Electricidad, another subsidiary company.

14. The shares of Ebro and Barcelonesa had been deposited by Barcelona Traction and Ebro with the National Trust company of Toronto as security for their bond issues. All the Ebro and the Barcelonesa ordinary shares were held outside Spain, and the possession taken of them was characterized as "mediate and constructive civil possession", that is to say was not accompanied by physical possession. Pursuant to the bankruptcy judgment the commissioner in bankruptcy at once dismissed the principal management personnel of the two companies and during the ensuing weeks the interim receiver appointed Spanish directors and declared that the companies were thus "normalized". Shortly after the bankruptcy judgment the petitioners brought about the extension of the taking of possession and related measures to the other subsidiary companies.

15. Proceedings in Spain to contest the bankruptcy judgment and the related decisions were instituted by Barcelona Traction, National Trust, the subsidiary companies and their directors or management personnel. However, Barcelona Traction, which had not received a judicial notice

of the bankruptcy proceedings, and was not represented before the Reus court in February, took no proceedings in the courts until 18 June 1948. In particular it did not enter a plea of opposition against the bankruptcy judgment within the time-limit of eight days from the date of publication of the judgment laid down in Spanish legislation. On the grounds that the notification and publication did not comply with the relevant legal requirements, the Belgian Government contends that the eight-day time-limit had never begun to run.

16. Motions contesting the jurisdiction of the Reus court and of the Spanish courts as a whole, in particular by certain bondholders, had a suspensive effect on the actions for redress; a decision on the question of jurisdiction was in turn delayed by lengthy proceedings brought by the Genora company, a creditor of Barcelona Traction, disputing Barcelona Traction's right to be a party to the proceedings on the jurisdictional issue. One of the motions contesting jurisdiction was not finally dismissed by the Barcelona court of appeal until 1963, after the Belgian Application had been filed with the International Court of Justice.

17. In June 1949, on an application by the Namel company, with the intervention of the Genora company, the Barcelona court of appeal gave a judgment making it possible for the meeting of creditors to be convened for the election of the trustees in bankruptcy, by excluding the necessary procedure from the suspensive effect of the motion contesting jurisdiction. Trustees were then elected, and procured decisions that new shares of the subsidiary companies should be created, cancelling the shares located outside Spain (December 1949), and that the head offices of Ebro and Catalanian Land should henceforth be at Barcelona and not Toronto. Finally in August 1951 the trustees obtained court authorization to sell "the totality of the shares, with all the rights attaching to them, representing the corporate capital" of the subsidiary companies, in the form of the newly-created share-certificates. The sale took place by public auction on 4 January 1952 on the basis of a set of General Conditions and became effective on 17 June 1952. The purchaser was a newly-formed company, Fuerzas Electricas de Cataluña, S.A. (Fecsa), which thereupon acquired complete control of the undertaking in Spain.

18. Proceedings before the court of Reus, various courts of Barcelona and the Spanish Supreme Court, to contest the sale and the operations which preceded or followed it, were taken by, among others, Barcelona Traction, National Trust and the Belgian company Sidro as a shareholder in Barcelona Traction, but without success. According to the Spanish Government, up to the filing of the Belgian Application, 2,736 orders had been made in the case and 494 judgments given by lower and 37 by higher courts. For the purposes of this Judgment it is not necessary to go into these orders and judgments.

19. After the bankruptcy declaration, representations were made to the Spanish Government by the British, Canadian, United States and Belgian Governments.

20. The British Government made representations to the Spanish Government on 23 February 1948 concerning the bankruptcy of Barcelona Traction and the seizure of its assets as well as those of Ebro and Barcelonesa, stating its interest in the situation of the bondholders resident in the United Kingdom. It subsequently supported the representations made by the Canadian Government.

21. The Canadian Government made representations to the Spanish Government in a series of diplomatic notes, the first being dated 27 March 1948 and the last 21 April 1952; in addition, approaches were made on a less official level in July 1954 and March 1955. The Canadian Government first complained of the denials of justice said to have been committed in Spain towards Barcelona Traction, Ebro and National Trust, but it subsequently based its complaints more particularly on conduct towards the Ebro company said to be in breach of certain treaty provisions applicable between Spain and Canada. The Spanish Government did not respond to a Canadian proposal for the submission of the dispute to arbitration and the Canadian Government subsequently confined itself, until the time when its interposition entirely ceased, to endeavouring to promote a settlement by agreement between the private groups concerned.

22. The United States Government made representations to the Spanish Government on behalf of Barcelona Traction in a note of 22 July 1949, in support of a note submitted by the Canadian Government the previous day. It subsequently continued its interposition through the diplomatic channel and by other means. Since references were made by the United States Government in these representations to the presence of American interests in Barcelona Traction, the Spanish Government draws the conclusion that, in the light of the customary practice of the United States Government to protect only substantial American investments abroad, the existence must be presumed of such large American interests as to rule out a preponderance of Belgian interests. The Belgian Government considers that the United States Government was motivated by a more general concern to secure equitable treatment of foreign investments in Spain, and in this context cites *inter alia* a note of 5 June 1967 from the United States Government.

23. The Spanish Government having stated in a note of 26 September 1949 that Ebro had not furnished proof as to the origin and genuineness of the bond debts, which justified the refusal of foreign currency transfers, the Belgian and Canadian Governments considered proposing to the Spanish Government the establishment of a tripartite committee to study the question. Before this proposal was made, the Spanish Government suggested in March 1950 the creation of a committee on which, in addition to Spain, only Canada and the United Kingdom would be represented. This proposal was accepted by the United Kingdom and Canadian Governments. The work of the committee led to a joint statement of 11 June 1951 by the three Governments to the effect, *inter alia*, that the attitude of the Spanish administration in not authorizing the transfers of foreign currency was fully justified. The Belgian Government protested

against the fact that it had not been invited to nominate an expert to take part in the enquiry, and reserved its rights; in the proceedings before the Court it contended that the joint statement of 1951, which was based on the work of the committee, could not be set up against it, being *res inter alios acta*.

24. The Belgian Government made representations to the Spanish Government on the same day as the Canadian Government, in a note of 27 March 1948. It continued its diplomatic intervention until the rejection by the Spanish Government of a Belgian proposal for submission to arbitration (end of 1951). After the admission of Spain to membership in the United Nations (1955), which, as found by the Court in 1964, rendered operative again the clause of compulsory jurisdiction contained in the 1927 Hispano-Belgian Treaty of Conciliation, Judicial Settlement and Arbitration, the Belgian Government attempted further representations. After the rejection of a proposal for a special agreement, it decided to refer the dispute unilaterally to this Court.

25. In the course of the written proceedings, the following submissions were presented by the Parties: . . . .<sup>4</sup>

In the course of the oral proceedings, the following text was presented as final submissions

*on behalf of the Belgian Government,*  
after the hearing of 9 July 1969:

"1. Whereas the Court stated on page 9 of its Judgment of 24 July 1964 that 'The Application of the Belgian Government of 19 June 1962 seeks reparation for damage claimed to have been caused to a number of Belgian nationals, said to be shareholders in the Barcelona Traction, Light and Power Company, Limited, a company under Canadian law, by the conduct, alleged to have been contrary to international law, of various organs of the Spanish State in relation to that company and to other companies of its group';

Whereas it was therefore manifestly wrong of the Spanish Government, in the submissions in the Counter-Memorial and in the oral arguments of its counsel, to persist in the contention that the object of the Belgian claim is to protect the Barcelona Traction company;

2. Whereas Barcelona Traction was adjudicated bankrupt in a judgment rendered by the court of Reus, in Spain, on 12 February 1948;

3. Whereas that holding company was on that date in a perfectly sound financial situation, as were its subsidiaries, Canadian or Spanish companies having their business in Spain;

4. Whereas, however, the Spanish Civil War and the Second World War had, from 1936 to 1944, prevented Barcelona Traction from being able to receive, from its subsidiaries operating in Spain, the foreign currency necessary for the service of the sterling loans issued by it for the financing of the group's investments in Spain;

5. Whereas, in order to remedy this situation, those in control of Barcelona Traction agreed with the bondholders in 1945, despite the opposition of the March group, to a plan of compromise, which was approved by the trustee and by the competent Canadian court; and whereas its implementation was rendered impossible as a result of

<sup>4</sup> In an omitted passage the Court quoted the earlier submissions by both parties.



the opposition of the Spanish exchange authorities, even though the method of financing finally proposed no longer involved any sacrifice of foreign currency whatever for the Spanish economy;

6. Whereas, using this situation as a pretext, the March group, which in the meantime had made further considerable purchases of bonds, sought and obtained the judgment adjudicating Barcelona Traction bankrupt;

7. Whereas the bankruptcy proceedings were conducted in such a manner as to lead to the sale to the March group, which took place on 4 January 1952, of all the assets of the bankrupt company, far exceeding in value its liabilities, in consideration of the assumption by the purchaser itself of solely the bonded debt, which, by new purchases, it had concentrated into its own hands to the extent of approximately 85 per cent., while the cash price paid to the trustees in bankruptcy, 10,000,000 pesetas—approximately \$250,000—, being insufficient to cover the bankruptcy costs, did not allow them to pass anything to the bankrupt company or its shareholders, or even to pay its unsecured creditors;

8. Whereas the accusations of fraud made by the Spanish Government against the Barcelona Traction company and the allegation that that company was in a permanent state of latent bankruptcy are devoid of all relevance to the case and, furthermore, are entirely unfounded;

9. Whereas the acts and omissions giving rise to the responsibility of the Spanish Government are attributed by the Belgian Government to certain administrative authorities, on the one hand, and to certain judicial authorities, on the other hand;

Whereas it is apparent when those acts and omissions are examined as a whole that, apart from the defects proper to each, they converged towards one common result, namely the diversion of the bankruptcy procedure from its statutory purposes to the forced transfer, without compensation, of the undertakings of the Barcelona Traction group to the benefit of a private Spanish group, the March group;

## I

### ABUSE OF RIGHTS, ARBITRARY AND DISCRIMINATORY ATTITUDE OF CERTAIN ADMINISTRATIVE AUTHORITIES

Considering that the Spanish administrative authorities behaved in an improper, arbitrary and discriminatory manner towards Barcelona Traction and its shareholders, in that, with the purpose of facilitating the transfer of control over the property of the Barcelona Traction group from Belgian hands into the hands of a private Spanish group, they in particular—

- (a) frustrated in October and December 1946, the implementation of the third method for financing the plan of compromise, by refusing to authorize Ebro, a Canadian company with residence in Spain, to pay 64,000,000 pesetas in the national currency to Spanish residents on behalf of Barcelona Traction, a non-resident company, so that the latter might redeem its peseta bonds circulating in Spain, despite the fact that Ebro continued uninterruptedly to be granted periodical authorization to pay the interest on those same bonds up to the time of the bankruptcy;
- (b) on the other hand, accepted that Juan March, a Spanish citizen manifestly resident in Spain, should purchase considerable quantities of Barcelona Traction sterling bonds abroad;

- (c) made improper use of an international enquiry, from which the Belgian Government was excluded, by gravely distorting the purport of the conclusions of the Committee of Experts, to whom they attributed the finding of irregularities of all kinds such as to entail severe penalties for the Barcelona Traction group, which enabled the trustees in bankruptcy, at March's instigation, to bring about the premature sale at a ridiculously low price of the assets of the Barcelona Traction group and their purchase by the March group thanks to the granting of all the necessary exchange authorizations;

## II

### USURPATION OF JURISDICTION

Considering that the Spanish courts, in agreeing to entertain the bankruptcy of Barcelona Traction, a company under Canadian law with its registered office in Toronto, having neither registered office nor commercial establishment in Spain, nor possessing any property or carrying on any business there, usurped a power of jurisdiction which was not theirs in international law;

Considering that the territorial limits of acts of sovereignty were patently disregarded in the measures of enforcement taken in respect of property situated outside Spanish territory without the concurrence of the competent foreign authorities;

Considering that there was, namely, conferred upon the bankruptcy authorities, through the artificial device of mediate and constructive civil possession, the power to exercise in Spain the rights attaching to the shares located in Canada of several subsidiary and sub-subsidiary companies on which, with the approval of the Spanish judicial authorities, they relied for the purpose of replacing the directors of those companies, modifying their terms of association, and cancelling their regularly issued shares and replacing them with others which they had printed in Spain and delivered to Fecsa at the time of the sale of the bankrupt company's property, without there having been any effort to obtain possession of the real shares in a regular way.

Considering that that disregard is the more flagrant in that three of the subsidiaries were companies under Canadian law with their registered offices in Canada and that the bankruptcy authorities purported, with the approval of the Spanish judicial authorities, to transform two of them into Spanish companies, whereas such alteration is not permitted by the law governing the status of those companies;

## III

### DENIALS OF JUSTICE LATO SENSU

Considering that a large number of decisions of the Spanish courts are vitiated by gross and manifest error in the application of Spanish law, by arbitrariness or discrimination, constituting in international law denials of justice *lato sensu*;

Considering that in particular—

(1) The Spanish courts agreed to entertain the bankruptcy of Barcelona Traction in flagrant breach of the applicable provisions of Spanish law, which do not permit that a foreign debtor should be adjudged bankrupt if that debtor does not have his domicile, or at least an establishment, in Spanish territory;

(2) Those same courts adjudged Barcelona Traction bankrupt whereas that company was neither in a state of insolvency nor in a

state of final, general and complete cessation of payments and had not ceased its payments in Spain, this being a manifest breach of the applicable statutory provisions of Spanish law, in particular Article 876 of the 1885 Commercial Code;

(3) The judgment of 12 February 1948 failed to order the publication of the bankruptcy by announcement in the place of domicile of the bankrupt, which constitutes a flagrant breach of Article 1044 (5) of the 1829 Commercial Code;

(4) The decisions failing to respect the separate estates of Barcelona Traction's subsidiaries and sub-subsidiaries, in that they extended to their property the attachment arising out of the bankruptcy of the parent company, and thus disregarded their distinct legal personalities, on the sole ground that all their shares belonged to Barcelona Traction or one of its subsidiaries, had no legal basis in Spanish law, were purely arbitrary and in any event constitute a flagrant breach of Article 35 of the Civil Code, Articles 116 and 174 of the 1885 Commercial Code (so far as the Spanish companies are concerned) and Article 15 of the same Code (so far as the Canadian companies are concerned), as well as of Article 1334 of the Civil Procedure Code;

If the estates of the subsidiaries and sub-subsidiaries could have been included in that of Barcelona Traction—*quod non*—, it would have been necessary to apply to that company the special régime established by the imperative provisions of Articles 930 *et seq.* of the 1885 Commercial Code and the Acts of 9 April 1904 and 2 January 1915 for the event that public-utility companies cease payment, and this was not done;

(5) The judicial decisions which conferred on the bankruptcy authorities the fictitious possession (termed "mediate and constructive civil possession") of the shares of certain subsidiary and sub-subsidiary companies have no statutory basis in Spanish bankruptcy law and were purely arbitrary; they comprise moreover a flagrant breach not only of the general principle recognized in the Spanish as in the majority of other legal systems to the effect that no person may exercise the rights embodied in negotiable securities without having at his disposal the securities themselves but also of Articles 1334 and 1351 of the Civil Procedure Code and Article 1046 of the 1829 Commercial Code, which require the bankruptcy authorities to proceed to the material apprehension of the bankrupt's property;

(6) The bestowal on the commissioner by the bankruptcy judgment of power to proceed to the dismissal, removal or appointment of members of the staff, employees and management, of the companies all of whose shares belonged to Barcelona Traction or one of its subsidiaries had no statutory basis in Spanish law and constituted a gross violation of the statutory provisions referred to under (4), first sub-paragraph, above and also of Article 1045 of the 1829 Commercial Code;

(7) The Spanish courts approved or tolerated the action of the trustees in setting themselves up as a purported general meeting of the two Canadian subsidiaries and in transforming them, in that capacity, into companies under Spanish law, thus gravely disregarding the rule embodied in Article 15 of the 1885 Commercial Code to the effect that the status and internal functioning of foreign companies shall be governed in Spain by the law under which they were incorporated;

(8) The Spanish courts approved or tolerated the action of the trustees in setting themselves up as purported general meetings and modifying, in that capacity, the terms of association of the Ebro, Catalanian Land, Union Eléctrica de Cataluña, Electricista Catalana,

Barcelonesa and Saltos del Segre companies, cancelling their shares and issuing new shares; they thus committed a manifest breach of Article 15 of the 1885 Commercial Code (so far as the two Canadian companies were concerned) and Articles 547 *et seq.* of the same code, which authorize the issue of duplicates only in the circumstances they specify; they also gravely disregarded the clauses of the trust deeds concerning voting-rights, in flagrant contempt of the undisputed rule of Spanish law to the effect that acts performed and agreements concluded validly by the bankrupt before the date of the cessation of payments as determined in the judicial decisions shall retain their effects and their binding force in respect of the bankruptcy authorities (Articles 878 *et seq.* of the 1885 Commercial Code);

(9) The Spanish courts decided at one and the same time to ignore the separate legal personalities of the subsidiary and sub-subsidiary companies (so as to justify the attachment of their property in Spain and their inclusion in the bankrupt estate) and implicitly but indubitably to recognize those same personalities by the conferring of fictitious possession of their shares on the bankruptcy authorities, thus giving decisions which were vitiated by an obvious self-contradiction revealing their arbitrary and discriminatory nature;

(10) The general meeting of creditors of 19 September 1949 convened for the purpose of appointing the trustees was, with the approval of the Spanish judicial authorities, held in flagrant breach of Articles 300 and 1342 of the Civil Procedure Code, and 1044 (3), 1060, 1061 and 1063 of the 1829 Commercial Code, in that (a) it was not convened on cognizance of the list of creditors; (b) when that list was prepared, it was not drawn up on the basis of particulars from the balance-sheet or the books and documents of the bankrupt company, which books and documents were not, as the Spanish Government itself admits, in the possession of the commissioner on 8 October 1949, while the judicial authorities had not at any time sent letters rogatory to Toronto, Canada, with the request that they be put at his disposal;

(11) By authorizing the sale of the property of the bankrupt company when the adjudication in bankruptcy had not acquired irrevocability and while the proceedings were suspended, the Spanish courts flagrantly violated Articles 919, 1167, 1319 and 1331 of the Civil Procedure Code and the general principles of the right of defence;

In so far as that authorization was based on the allegedly perishable nature of the property to be sold, it constituted a serious disregard of Article 1055 of the 1829 Commercial Code and Article 1354 of the Civil Procedure Code, which articles allow the sale only of movable property which cannot be kept without deteriorating or spoiling; even supposing that those provisions could be applied in general to the property of Barcelona Traction, its subsidiaries and sub-subsidiaries—*quod non*—, there would still have been a gross and flagrant violation of them, inasmuch as that property as a whole was obviously not in any imminent danger of serious depreciation; indeed the only dangers advanced by the trustees, namely those arising out of the threats of prosecution contained in the Joint Statement, had not taken shape, either by the day on which authorization to sell was requested or by the day of the sale, in any proceedings or demand by the competent authorities and did not ever materialize, except to an insignificant extent;

The only penalty which the undertakings eventually had to bear, 15 months after the sale, was that relating to the currency offence, which had occasioned an *embargo* for a much higher sum as early as April 1948;

(12) The authorization to sell and the sale, in so far as they related to the shares of the subsidiary and sub-subsidiary companies without delivery of the certificates, constituted a flagrant violation of Articles 1461 and 1462 of the Spanish Civil Code, which require delivery of the thing sold, seeing that the certificates delivered to the successful bidder had not been properly issued and were consequently without legal value; if the authorization to sell and the sale had applied, as the respondent Government wrongly maintains, to the rights attaching to the shares and bonds or to the bankrupt company's power of domination over its subsidiaries, those rights ought to have been the subject of a joint valuation, on pain of flagrant violation of Articles 1084 to 1089 of the 1829 Commercial Code and Article 1358 of the Civil Procedure Code; in any event, it was in flagrant violation of these last-named provisions that the commissioner fixed an exaggeratedly low reserve price on the basis of a unilateral expert opinion which, through the effect of the General Conditions of Sale, allowed the March group to acquire the auctioned property at that reserve price;

(13) By approving the General Conditions of Sale on the very day on which they were submitted to them and then dismissing the proceedings instituted to contest those conditions, the judicial authorities committed a flagrant violation of numerous *ordre public* provisions of Spanish law; thus, in particular, the General Conditions of Sale—

- (a) provided for the payment of the bondholder creditors, an operation which, under Article 1322 of the Civil Procedure Code, falls under the fourth section of the bankruptcy, whereas that section was suspended as a result of the effects attributed to the Boter motion contesting jurisdiction, no exemption from that suspension having been applied for or obtained in pursuance of the second paragraph of Article 114 of the Civil Procedure Code;
- (b) provided for the payment of the debts owing on the bonds before they had been approved and ranked by a general meeting of the creditors on the recommendation of the trustees, contrary to Articles 1101 to 1109 of the 1829 Commercial Code and to Articles 1266 to 1274, 1286 and 1378 of the Civil Procedure Code;
- (c) in disregard of Articles 1236, 1240, 1512 and 1513 of the Civil Procedure Code, did not require the price to be lodged or deposited at the Court's disposal;
- (d) conferred on the trustees power to recognize, determine and declare effective the rights attaching to the bonds, in disregard, on the one hand, of Articles 1101 to 1109 of the 1829 Commercial Code and of Articles 1266 to 1274 of the Civil Procedure Code, which reserve such rights for the general meeting of creditors under the supervision of the judge, and, on the other, of Articles 1445 and 1449 of the Civil Code, which lay down that the purchase price must be a definite sum and may not be left to the arbitrary decision of one of the contracting parties;
- (e) in disregard of Articles 1291 to 1294 of the Civil Procedure Code, substituted the successful bidder for the trustees in respect of the payment of the debts owing on the bonds, whilst, in violation of the general principles applicable to novation, replacing the security for those debts, consisting, pursuant to the trust deeds, of shares and bonds issued by the subsidiary and sub-subsidiary companies, with the deposit of a certain sum with a bank or with a mere banker's guarantee limited to three years;

- (f) delegated to a third party the function of paying certain debts, in disregard of Articles 1291 and 1292 of the Civil Procedure Code, which define the functions of the trustees in this field and do not allow of any delegation;
- (g) ordered the payment of the debts owing on the bonds in sterling, whereas a forced execution may only be carried out in local currency and in the case of bankruptcy the various operations which it includes require the conversion of the debts into local currency on the day of the judgment adjudicating bankruptcy, as is to be inferred from Articles 883 and 884 of the 1885 Commercial Code;

#### IV

##### DENIALS OF JUSTICE STRICTO SENSU

Considering that in the course of the bankruptcy proceedings the rights of the defence were seriously disregarded; that in particular—

- (a) the Reus court, in adjudicating Barcelona Traction bankrupt on an *ex parte* petition, inserted in its judgment provisions which went far beyond finding the purported insolvency of or a general cessation of payments by the bankrupt company, the only finding, in addition to one on the capacity of the petitioners, that it was open to it to make in such proceedings;

This disregard of the rights of the defence was particularly flagrant in respect of the subsidiary companies, whose property was ordered by the court to be attached without their having been summonsed and without their having been adjudicated bankrupt;

- (b) the subsidiary companies that were thus directly affected by the judgment of 12 February 1948 nevertheless had their applications to set aside the order for attachment which concerned them rejected as inadmissible on the grounds of lack of capacity;
- (c) the pursuit of those remedies and the introduction of any other such proceedings were also made impossible for the subsidiary companies by the discontinuances effected each time by the solicitors appointed to replace the original solicitors by the new boards of directors directly or indirectly involved; these changes of solicitors and discontinuances were effected by the new boards of directors by virtue of authority conferred upon them by the interim receiver simultaneously with their appointment;
- (d) the proceedings for relief brought by those in control of the subsidiary companies who had been dismissed by the commissioner were likewise held inadmissible by the Reus court when they sought to avail themselves of the specific provisions of Article 1363 of the Civil Procedure Code, which provide for proceedings to reverse decisions taken by the commissioner in bankruptcy;
- (e) there was discrimination on the part of the first special judge when he refused to admit as a party to the bankruptcy the Canadian National Trust Company, Limited, trustee for the bankrupt company's two sterling loans, even though it relied upon the security of the mortgage which had been given to it by Ebro, whereas at the same time he admitted to the proceedings the Bondholders' Committee appointed by Juan March, although National Trust and the Committee derived their powers from the same trust deeds;
- (f) the complaints against the General Conditions of Sale could be neither amplified nor heard because the order which had approved

the General Conditions of Sale was deemed to be one of mere routine;

Considering that many years elapsed after the bankruptcy judgment and even after the ruinous sale of the property of the Barcelona Traction group without either the bankrupt company or those co-interested with it having had an opportunity to be heard on the numerous complaints put forward against the bankruptcy judgment and related decisions in the opposition of 18 June 1948 and in various other applications for relief;

Considering that those delays were caused by the motion contesting jurisdiction fraudulently lodged by a confederate of the petitioners in bankruptcy and by incidental proceedings instituted by other men of straw of the March group, which were, like the motion contesting jurisdiction, regularly admitted by the various courts;

Considering that both general international law and the Spanish-Belgian Treaty of 1927 regard such delays as equivalent to the denial of a hearing;

Considering that the manifest injustice resulting from the movement of the proceedings towards the sale, whilst the actions contesting the bankruptcy judgment and even the jurisdiction of the Spanish courts remained suspended, was brought about by two judgments delivered by the same chamber of the Barcelona court of appeal on the same day, 7 June 1949: in one of them it confirmed the admission, with two effects, of the Boter appeal from the judgment of the special judge rejecting his motion contesting jurisdiction, whereas in the other it reduced the suspensive effect granted to that same appeal by excluding from the suspension the calling of the general meeting of creditors for the purpose of appointing the trustees in bankruptcy;

## V

### DAMAGE AND REPARATION

Considering that the acts and omissions contrary to international law attributed to the organs of the Spanish State had the effect of despoiling the Barcelona Traction company of the whole of its property and of depriving it of the very objects of its activity, and thus rendered it practically defunct;

Considering that Belgian nationals, natural and juristic persons, shareholders in Barcelona Traction, in which they occupied a majority and controlling position, and in particular the Sidro company, the owner of more than 75 per cent, of the registered capital, on this account suffered direct and immediate injury to their interests and rights, which were voided of all value and effectiveness;

Considering that the reparation due to the Belgian State from the Spanish State, as a result of the internationally unlawful acts for which the latter State is responsible, must be complete and must, so far as possible, reflect the damage suffered by its nationals whose case the Belgian State has taken up; and that, since *restitutio in integrum* is, in the circumstances of the case, practically and legally impossible, the reparation of the damage suffered can only take place in the form of an all-embracing pecuniary indemnity, in accordance with the provisions of the Spanish-Belgian Treaty of 1927 and with the rules of general international law;

Considering that in the instant case the amount of the indemnity must be fixed by taking as a basis the net value of the Barcelona Traction company's property at the time of its adjudication in bankruptcy, ex-

pressed in a currency which has remained stable, namely, the United States dollar;

Considering that the value of that property must be determined by the replacement cost of the subsidiary and sub-subsidiary companies' plant for the production and distribution of electricity at 12 February 1948, as that cost was calculated by the Ebro company's engineers in 1946;

Considering that, according to those calculations, and after deduction for depreciation through wear and tear, the value of the plant was at that date U.S. \$116,220,000; from this amount there must be deducted the principal of Barcelona Traction's bonded debt and the interest that had fallen due thereon, that is to say, U.S. \$27,619,018, which leaves a net value of about U.S. \$88,600,000, this result being confirmed—

(1) by the study submitted on 5 February 1949 and on behalf of Ebro to the Special Technical Office for the Regulation and Distribution of Electricity (Catalonian region) (Belgian New Document No. 50);

(2) by capitalization of the 1947 profits;

(3) by the profits made by Fecsa in 1956—the first years after 1948 in which the position of electricity companies was fully stabilized and the last year before the changes made in the undertaking by Fecsa constituted an obstacle to any useful comparison;

(4) by the reports of the experts consulted by the Belgian Government;

Considering that the compensation due to the Belgian Government must be estimated, in the first place, at the percentage of such net value corresponding to the participation of Belgian nationals in the capital of the Barcelona Traction company, namely 88 per cent.;

Considering that on the critical dates of the bankruptcy judgment and the filing of the Application, the capital of Barcelona Traction was represented by 1,798,854 shares, partly bearer and partly registered; that on 12 February 1948 Sidro owned 1,012,688 registered shares and 349,905 bearer shares; that other Belgian nationals owned 420 registered shares and at least 244,832 bearer shares; that 1,607,845 shares, constituting 89.3 per cent. of the company's capital, were thus on that date in Belgian hands; that on 14 June 1962 Sidro owned 1,354,514 registered shares and 31,228 bearer shares; that other Belgian nationals owned 2,388 registered shares and at least 200,000 bearer shares; and that 1,588,130 shares, constituting 88 per cent. of the company's capital, were thus on that date in Belgian hands;

Considering that the compensation claimed must in addition cover all incidental damage suffered by the said Belgian nationals as a result of the acts complained of, including the deprivation of enjoyment of rights, the expenses incurred in the defence of their rights and the equivalent, in capital and interest, of the amount of the Barcelona Traction bonds held by Belgian nationals, and of their other claims on the companies in the group which it was not possible to recover owing to the acts complained of;

Considering that the amount of such compensation, due to the Belgian State on account of acts contrary to international law attributable to the Spanish State, cannot be affected by the latter's purported charges against the private persons involved, those charges furthermore not having formed the subject of any counterclaim before the Court;



## VI

OBJECTION DERIVED FROM THE ALLEGED LACK OF *JUS STANDI* OF THE  
BELGIAN GOVERNMENT

Considering that in its Judgment of 24 July 1964 the Court decided to join to the merits the third preliminary objection raised by the Spanish Government;

Considering that the respondent Government wrongly denies to the Belgian Government *jus standi* in the present proceedings;

Considering that the object of the Belgian Government's Application of 14 June 1962 is reparation for the damage caused to a certain number of its nationals, natural and juristic persons, in their capacity as shareholders in the Barcelona Traction, Light and Power Company, Limited, by the conduct contrary to international law of various organs of the Spanish State towards that company and various other companies in its group;

Considering that the Belgian Government has established that 88 per cent. of Barcelona Traction's capital was in Belgian hands on the critical dates of 12 February 1948 and 14 June 1962 and so remained continuously between those dates; that a single Belgian company, Sidro, possessed more than 75 per cent. of the shares; that the Belgian nationality of that company and the effectiveness of its nationality have not been challenged by the Spanish Government;

Considering that the fact that the Barcelona Traction registered shares possessed by Sidro were registered in Canada in the name of American nominees does not affect their Belgian character; that in this case, under the applicable systems of statutory law, the nominee could exercise the rights attaching to the shares entered in its name only as Sidro's agent;

Considering that the preponderance of Belgian interests in the Barcelona Traction company was well known to the Spanish authorities at the different periods in which the conduct complained of against them occurred, and has been explicitly admitted by them on more than one occasion;

Considering that the diplomatic protection from which the company benefited for a certain time on the part of its national Government ceased in 1952, well before the filing of the Belgian Application, and has never subsequently been resumed;

Considering that by depriving the organs appointed by the Barcelona Traction shareholders under the company's terms of association of their power of control in respect of its subsidiaries, which removed from the company the very objects of its activities, and by depriving it of the whole of its property, the acts and omissions contrary to international law attributed to the Spanish authorities rendered the company practically defunct and directly and immediately injured the rights and interests attaching to the legal situation of shareholder as it is recognized by international law; that they thus caused serious damage to the company's Belgian shareholders and voided the rights which they possessed in that capacity of all useful content;

Considering that in the absence of reparation to the company for the damage inflicted on it, from which they would have benefited at the same time as itself, the Belgian shareholders of Barcelona Traction thus have separate and independent rights and interests to assert; that they did in fact have to take the initiative for and bear the cost of all the proceedings brought through the company's organs to seek relief in the Spanish courts; that Sidro and other Belgian shareholders, after the sale

of Barcelona Traction's property, themselves brought actions the dismissal of which is complained of by the Belgian Government as constituting a denial of justice;

Considering that under the general principles of international law in this field the Belgian Government has *jus standi* to claim through international judicial proceedings reparation for the damage thus caused to its nationals by the internationally unlawful acts and omissions attributed to the Spanish State;

## VII

### OBJECTION OF NON-EXHAUSTION OF LOCAL REMEDIES

Considering that no real difference has emerged between the parties as to the scope and significance of the rule of international law embodied in Article 3 of the Treaty of Conciliation, Judicial Settlement and Arbitration concluded between Spain and Belgium on 19 July 1927, which makes resort to the procedures provided for in that Treaty dependant on the prior use, until a judgment with final effect has been pronounced, of the normal means of redress which are available and which offer genuine possibilities of effectiveness within the limitation of a reasonable time;

Considering that in this case the Respondent itself estimates at 2,736 the number of orders alone made in the case by the Spanish courts as of the date of the Belgian Application;

Considering that in addition the pleadings refer to more than 30 decisions by the Supreme Court;

Considering that it is not contended that the remedies as a whole of which Barcelona Traction and its co-interested parties availed themselves and which gave rise to those decisions were inadequate or were not pursued to the point of exhaustion;

Considering that this circumstance suffices as a bar to the possibility of the fourth objection being upheld as setting aside the Belgian claim;

Considering that the only complaints which could be set aside are those in respect of which the Spanish Government proved failure to make use of means of redress or the insufficiency of those used;

Considering that such proof has not been supplied;

#### *I. With Respect to the Complaints Against the Acts of the Administrative Authorities*

Considering that the Spanish Government is wrong in contending that the Belgian complaint concerning the decisions of October and December 1946 referred to under I (a) above is not admissible on account of Barcelona Traction's failure to exercise against them the remedies of appeal to higher authority and contentious administrative proceedings;

Considering that the remedy of appeal to higher authority was inconceivable in this case, being by definition an appeal which may be made from a decision by one administrative authority to another hierarchically superior authority, namely the Minister, whereas the decisions complained of were taken with the co-operation and approval of the Minister himself, and even brought to the knowledge of those concerned by the Minister at the same time as by the competent administrative authority;

Considering that it was likewise not possible to envisage contentious administrative proceedings against a decision which patently did not fall within the ambit of Article 1 of the Act of 22 June 1894, which recognizes such a remedy only against administrative decisions emanating

from administrative authorities in the exercise of their regulated powers and "infringing a right of an administrative character previously established in favour of the applicant by an Act, a regulation or some other administrative provision," which requirements were patently not satisfied in this case;

*2. With Respect to the Complaint Concerning the Reus Court's Lack of Jurisdiction to Declare the Bankruptcy of Barcelona Traction*

Considering that the Spanish Government is wrong in seeking to derive an argument from the fact that Barcelona Traction and its co-interested parties supposedly failed to challenge the jurisdiction of the Reus court by means of a motion contesting its competence, and allowed the time-limit for entering opposition to expire without having challenged that jurisdiction;

Considering that in fact a motion contesting jurisdiction is not at all the same thing as a motion contesting competence *ratione materiae* and may properly be presented cumulatively with the case on the merits;

Considering that the bankrupt company contested jurisdiction at the head of the complaints set out in its opposition plea of 18 June 1948;

Considering that it complained again of lack of jurisdiction in its application of 5 July 1948 for a declaration of nullity and in its pleading of 3 September 1948 in which it confirmed its opposition to the bankruptcy judgment;

Considering that National Trust submitted a formal motion contesting jurisdiction in its application of 27 November 1948 for admission to the bankruptcy proceedings;

Considering that Barcelona Traction, after having as early as 23 April 1949 entered an appearance in the proceedings concerning the Boter motion contesting jurisdiction, formally declared its adherence to that motion by a procedural document of 11 April 1953;

Considering that the question of jurisdiction being a matter of *ordre public*, as is the question of competence *ratione materiae*, the complaint of belatedness could not be upheld, even in the event of the expiry of the allegedly applicable time-limit for entering a plea of opposition;

*3. With Respect to the Complaints Concerning the Bankruptcy Judgment and Related Decisions*

Considering that the Spanish Government is wrong in contending that the said decisions were not attacked by adequate remedies pursued to the point of exhaustion or for a reasonable length of time;

Considering that in fact, as early as 16 February 1948, the bankruptcy judgment was attacked by an application for its setting aside on the part of the subsidiary companies, Ebro and Barcelonesa;

Considering that while those companies admittedly confined their applications for redress to the parts of the judgment which gave them grounds for complaint, the said remedies were nonetheless adequate and they were brought to nought in circumstances which are themselves the subject of a complaint which has been set out above;

Considering that, contrary to what is asserted by the Spanish Government, the bankrupt company itself entered a plea of opposition to the judgment by a procedural document of 18 June 1948, confirmed on 3 September 1948;

Considering that it is idle for the Spanish Government to criticize the summary character of this procedural document, while the suspension decreed by the special judge on account of the Boter motion contesting

jurisdiction prevented the party entering opposition from filing, pursuant to Article 326 of the Civil Procedure Code, the additional pleading developing its case;

Considering that likewise there can be no question of belatedness, since only publication of the bankruptcy at the domicile of the bankrupt company could have caused the time-limit for entering opposition to begin to run, and no such publication took place;

Considering that the bankruptcy judgment and the related decisions were moreover also attacked in the incidental application for a declaration of nullity submitted by Barcelona Traction on 5 July 1948 and amplified on 31 July 1948;

*4. With Respect to the Complaints Concerning the Blocking of the Remedies*

Considering that the various decisions which instituted and prolonged the suspension of the first section of the bankruptcy proceedings were attacked on various occasions by numerous proceedings taken by Barcelona Traction, beginning with the incidental application for a declaration of nullity which it submitted on 5 July 1948;

*5. With Respect to the Complaint Concerning the Dismissal of the Officers of the Subsidiary Companies by Order of the Commissioner*

Considering that this measure was also attacked by applications for its setting aside on the part of the persons concerned, which were quite improperly declared inadmissible; and that the proceedings seeking redress against those decisions were adjourned until 1963;

*6. With Respect to the Failure to Observe the No-Action Clause*

Considering that this clause was explicitly referred to by National Trust in its application of 27 November 1948 for admission to the proceedings;

*7. With Respect to the Measures Preparatory to the Sale and the Sale*

Considering that the other side, while implicitly admitting that adequate proceedings were taken to attack the appointment of the trustees and the authorization to sell, is wrong in contending that this was supposedly not so in respect of —

(1) The failure to draw up a list of creditors prior to the convening of the meeting of creditors for the appointment of the trustees, whereas this defect was complained of in the procedural document attacking the appointment of the trustees and in the application that the sale be declared null and void;

(2) Certain acts and omissions on the part of the trustees, whereas they were referred to in the proceedings taken to attack the authorization to sell and the decision approving the method of unilateral valuation of the assets;

(3) The conditions of sale, whereas they were attacked by Barcelona Traction in an application to set aside and on appeal, in the application of 27 December 1951 for a declaration of nullity containing a formal prayer that the order approving the conditions of sale be declared null and void, and in an application of 28 May 1955 (New Documents submitted by the Belgian Government, 1969, No. 30); the same challenge was expressed by Sidro in its action of 7 February 1953 (New Documents submitted by the Spanish Government, 1969) and by two other

Belgian shareholders of Barcelona Traction, Mrs. Mathot and Mr. Duvi-vier, in their application of 26 May 1955 (New Documents submitted by the Belgian Government, 1969, No. 29);

#### 8. *With Respect to the Exceptional Remedies*

Considering that the Spanish Government is wrong in raising as an objection to the Belgian claim the allegation that Barcelona Traction did not make use of certain exceptional remedies against the bankruptcy judgment, such as application for revision, action for civil liability and criminal proceedings against the judges, and application for a hearing by a party in default;

Considering that the first of these remedies could patently not be contemplated, not only on account of the nature of the bankruptcy judgment, but also because until 1963 there was an opposition outstanding against that Judgment and, superabundantly, because Barcelona Traction, its subsidiaries and co-interested parties would not have been in a position to prove the facts of subornation, violence or fraudulent machination which alone could have entitled such proceedings to be taken;

Considering that the remedies of an action for civil liability and criminal proceedings against the judges were not adequate, since they were not capable of bringing about the annulment or setting aside of the decisions constituting denials of justice;

Considering that similarly the remedy of application for a hearing accorded by Spanish law to a party in default was patently in this case neither available to Barcelona Traction nor adequate;

FOR THESE REASONS, and any others which have been adduced by the Belgian Government in the course of the proceedings,

May it please the Court, rejecting any other submissions of the Spanish State which are broader or to a contrary effect,

To uphold the claims of the Belgian Government expressed in the submissions [in] the Reply."

The following final submissions were presented

*on behalf of the Spanish Government*, at the hearing of 22 July 1969:

"Considering that the Belgian Government has no *jus standi* in the present case, either for the protection of the Canadian Barcelona Traction company or for the protection of alleged Belgian 'shareholders' of that company;

Considering that the requirements of the exhaustion of local remedies rule have not been satisfied either by the Barcelona Traction company or by its alleged 'shareholders';

Considering that as no violation of an international rule binding on Spain has been established, Spain has not incurred any responsibility vis-à-vis the applicant State on any account; and that, in particular —

- (a) Spain is not responsible for any usurpation of jurisdiction on account of the action of its judicial organs;
- (b) the Spanish judicial organs have not violated the rules of international law requiring that foreigners be given access to the courts, that a decision be given on their claims and that their proceedings for redress should not be subjected to unjustified delays;
- (c) there have been no acts of the Spanish judiciary capable of giving rise to international responsibility on the part of Spain on account of the content of judicial decisions; and

(d) there has not been on the part of the Spanish administrative authorities any violation of an international obligation on account of abuse of rights or discriminatory acts;

Considering that for these reasons, and any others expounded in the written and oral proceedings, the Belgian claims must be deemed to be inadmissible or unfounded;

The Spanish Government presents to the Court its final submissions:

May it please the Court to adjudge and declare that the Belgian Government's claims are dismissed."

23. As has been indicated earlier, in opposition to the Belgian Application the Spanish Government advanced four objections of a preliminary nature. In its Judgment of 24 July 1964 the Court rejected the first and second of these (see paragraph 3 above), and decided to join the third and fourth to the merits. The latter were, briefly, to the effect that the Belgian Government lacked capacity to submit any claim in respect of wrongs done to a Canadian company, even if the shareholders were Belgian, and that local remedies available in Spain had not been exhausted.

27. In the subsequent written and oral proceedings the Parties supplied the Court with abundant material and information bearing both on the preliminary objections not decided in 1964 and on the merits of the case. In this connection the Court considers that reference should be made to the unusual length of the present proceedings, which has been due to the very long time-limits requested by the Parties for the preparation of their written pleadings and in addition to their repeated requests for an extension of these limits. The Court did not find that it should refuse these requests and thus impose limitations on the Parties in the preparation and presentation of the arguments and evidence which they considered necessary. It nonetheless remains convinced of the fact that it is in the interest of the authority and proper functioning of international justice for cases to be decided without unwarranted delay.

28. For the sake of clarity, the Court will briefly recapitulate the claim and identify the entities concerned in it. The claim is presented on behalf of natural and juristic persons, alleged to be Belgian nationals and shareholders in the Barcelona Traction, Light and Power Company, Limited. The submissions of the Belgian Government make it clear that the object of its Application is reparation for damage allegedly caused to these persons by the conduct, said to be contrary to international law, of various organs of the Spanish State towards that company and various other companies in the same group.

29. In the first of its submissions, more specifically in the Counter-Memorial, the Spanish Government contends that the Belgian Application of 1962 seeks, though disguisedly, the same object as the Application of 1958, i.e., the protection of the Barcelona Traction company as such, as a separate corporate entity, and that the claim should in consequence be dismissed. However, in making its new Application, as it has chosen to frame it, the Belgian Government was only exercising the freedom of action of any State to formulate its claim in its own way. The Court is therefore

bound to examine the claim in accordance with the explicit content imparted to it by the Belgian Government.

30. The States which the present case principally concerns are Belgium, the national State of the alleged shareholders, Spain, the State whose organs are alleged to have committed the unlawful acts complained of, and Canada, the State under whose laws Barcelona Traction was incorporated and in whose territory it has its registered office ("head office" in the terms of the by-laws of Barcelona Traction).

31. Thus the Court has to deal with a series of problems arising out of a triangular relationship involving the State whose nationals are shareholders in a company incorporated under the laws of another State, in whose territory it has its registered office; the State whose organs are alleged to have committed against the company unlawful acts prejudicial to both it and its shareholders; and the State under whose laws the company is incorporated, and in whose territory it has its registered office.

32. In these circumstances it is logical that the Court should first address itself to what was originally presented as the subject-matter of the third preliminary objection: namely the question of the right of Belgium to exercise diplomatic protection of Belgian shareholders in a company which is a juristic entity incorporated in Canada, the measures complained of having been taken in relation not to any Belgian national but to the company itself.

33. When a State admits into its territory foreign investments or foreign nationals, whether natural or juristic persons, it is bound to extend to them the protection of the law and assumes obligations concerning the treatment to be afforded them. These obligations, however, are neither absolute nor unqualified. In particular, an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.

34. Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered into the body of general international law (*Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951, p. 23*); others are conferred by international instruments of a universal or quasi-universal character.

35. Obligations the performance of which is the subject of diplomatic protection are not of the same category. It cannot be held, when one such obligation in particular is in question, in a specific case, that all States have a legal interest in its observance. In order to bring a claim in respect of

the breach of such an obligation, a State must first establish its right to do so, for the rules on the subject rest on two suppositions:

"The first is that the defendant State has broken an obligation towards the national State in respect of its nationals. The second is that only the party to whom an international obligation is due can bring a claim in respect of its breach." (*Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, I.C.J. Reports 1949*, pp. 181-182.)

In the present case it is therefore essential to establish whether the losses allegedly suffered by Belgian shareholders in Barcelona Traction were the consequence of the violation of obligations of which they were the beneficiaries. In other words: has a right of Belgium been violated on account of its nationals' having suffered infringement of their rights as shareholders in a company not of Belgian nationality?

36. Thus it is the existence or absence of a right, belonging to Belgium and recognized as such by international law, which is decisive for the problem of Belgium's capacity.

"This right is necessarily limited to intervention [by a State] on behalf of its own nationals because, in the absence of a special agreement, it is the bond of nationality between the State and the individual which alone confers upon the State the right of diplomatic protection, and it is as a part of the function of diplomatic protection that the right to take up a claim and to ensure respect for the rules of international law must be envisaged." (*Panevezys-Saldutiskis Railway, Judgment, 1939, P.C.I.J., Series A/B, No. 76, p. 16.*)

It follows that the same question is determinant in respect of Spain's responsibility towards Belgium. Responsibility is the necessary corollary of a right. In the absence of any treaty on the subject between the Parties, this essential issue has to be decided in the light of the general rules of diplomatic protection.

37. In seeking to determine the law applicable to this case, the Court has to bear in mind the continuous evolution of international law. Diplomatic protection deals with a very sensitive area of international relations, since the interest of a foreign State in the protection of its nationals confronts the rights of the territorial sovereign, a fact of which the general law on the subject has had to take cognizance in order to prevent abuses and friction. From its origins closely linked with international commerce, diplomatic protection has sustained a particular impact from the growth of international economic relations, and at the same time from the profound transformations which have taken place in the economic life of nations. These latter changes have given birth to municipal institutions, which have transcended frontiers and have begun to exercise considerable influence on international relations. One of these phenomena which has a particular bearing on the present case is the corporate entity.

38. In this field international law is called upon to recognize institutions of municipal law that have an important and extensive role in the international field. This does not necessarily imply drawing any analogy between



its own institutions and those of municipal law, nor does it amount to making rules of international law dependent upon categories of municipal law. All it means is that international law has had to recognize the corporate entity as an institution created by States in a domain essentially within their domestic jurisdiction. This in turn requires that, whenever legal issues arise concerning the rights of States with regard to the treatment of companies and shareholders, as to which rights international law has not established its own rules, it has to refer to the relevant rules of municipal law. Consequently, in view of the relevance to the present case of the rights of the corporate entity and its shareholders under municipal law, the Court must devote attention to the nature and interrelation of those rights.

39. Seen in historical perspective, the corporate personality represents a development brought about by new and expanding requirements in the economic field, an entity which in particular allows of operation in circumstances which exceed the normal capacity of individuals. As such it has become a powerful factor in the economic life of nations. Of this, municipal law has had to take due account, whence the increasing volume of rules governing the creation and operation of corporate entities, endowed with a specific status. These entities have rights and obligations peculiar to themselves.

40. There is, however, no need to investigate the many different forms of legal entity provided for by the municipal laws of States, because the Court is concerned only with that exemplified by the company involved in the present case: Barcelona Traction—a limited liability company whose capital is represented by shares. There are, indeed, other associations, whatever the name attached to them by municipal legal systems, that do not enjoy independent corporate personality. The legal difference between the two kinds of entity is that for the limited liability company it is the overriding tie of legal personality which is determinant; for the other associations, the continuing autonomy of the several members

41. Municipal law determines the legal situation not only of such limited liability companies but also of those persons who hold shares in them. Separated from the company by numerous barriers, the shareholder cannot be identified with it. The concept and structure of the company are founded on and determined by a firm distinction between the separate entity of the company and that of the shareholder, each with a distinct set of rights. The separation of property rights as between company and shareholder is an important manifestation of this distinction. So long as the company is in existence the shareholder has no right to the corporate assets.

42. It is a basic characteristic of the corporate structure that the company alone, through its directors or management acting in its name, can take action in respect of matters that are of a corporate character. The underlying justification for this is that, in seeking to serve its own best interests, the company will serve those of the shareholder too. Ordinarily, no individual shareholder can take legal steps, either in the name of the company or in his own name. If the shareholders disagree with the decisions taken on behalf of the company they may, in accordance with its articles or the

relevant provisions of the law, change them or replace its officers, or take such action as is provided by law. Thus to protect the company against abuse by its management or the majority of shareholders, several municipal legal systems have vested in shareholders (sometimes a particular number is specified) the right to bring an action for the defence of the company, and conferred upon the minority of shareholders certain rights to guard against decisions affecting the rights of the company vis-à-vis its management or controlling shareholders. Nonetheless the shareholders' rights in relation to the company and its assets remain limited, this being, moreover, a corollary of the limited nature of their liability.

43. At this point the Court would recall that in forming a company, its promoters are guided by all the various factors involved, the advantages and disadvantages of which they take into account. So equally does a shareholder, whether he is an original subscriber of capital or a subsequent purchaser of the company's shares from another shareholder. He may be seeking safety of investment, high dividends or capital appreciation—or a combination of two or more of these. Whichever it is, it does not alter the legal status of the corporate entity or affect the rights of the shareholder. In any event he is bound to take account of the risk of reduced dividends, capital depreciation or even loss, resulting from ordinary commercial hazards or from prejudice caused to the company by illegal treatment of some kind.

44. Notwithstanding the separate corporate personality, a wrong done to the company frequently causes prejudice to its shareholders. But the mere fact that damage is sustained by both company and shareholder does not imply that both are entitled to claim compensation. Thus no legal conclusion can be drawn from the fact that the same event caused damage simultaneously affecting several natural or juristic persons. Creditors do not have any right to claim compensation from a person who, by wronging their debtor, causes them loss. In such cases, no doubt, the interests of the aggrieved are affected, but not their rights. Thus whenever a shareholder's interests are harmed by an act done to the company, it is to the latter that he must look to institute appropriate action; for although two separate entities may have suffered from the same wrong, it is only one entity whose rights have been infringed.

45. However, it has been argued in the present case that a company represents purely a means of achieving the economic purpose of its members, namely the shareholders, while they themselves constitute in fact the reality behind it. It has furthermore been repeatedly emphasized that there exists between a company and its shareholders a relationship describable as a community of destiny. The alleged acts may have been directed at the company and not the shareholders, but only in a formal sense: in reality, company and shareholders are so closely interconnected that prejudicial acts committed against the former necessarily wrong the latter; hence any acts directed against a company can be conceived as directed against its shareholders, because both can be considered in substance, i.e., from the economic viewpoint, identical. Yet even if a company is no more than a means

for its shareholders to achieve their economic purpose, so long as it is *in esse* it enjoys an independent existence. Therefore the interests of the shareholders are both separable and indeed separated from those of the company, so that the possibility of their diverging cannot be denied.

46. It has also been contended that the measures complained of, although taken with respect to Barcelona Traction and causing it direct damage, constituted an unlawful act vis-à-vis Belgium, because they also, though indirectly, caused damage to the Belgian shareholders in Barcelona Traction. This again is merely a different way of presenting the distinction between injury in respect of a right and injury to a simple interest. But, as the Court has indicated, evidence that damage was suffered does not *ipso facto* justify a diplomatic claim. Persons suffer damage or harm in most varied circumstances. This in itself does not involve the obligation to make reparation. Not a mere interest affected, but solely a right infringed involves responsibility, so that an act directed against and infringing only the company's rights does not involve responsibility towards the shareholders, even if their interests are affected.

47. The situation is different if the act complained of is aimed at the direct rights of the shareholder as such. It is well known that there are rights which municipal law confers upon the latter distinct from those of the company, including the right to any declared dividend, the right to attend and vote at general meetings, the right to share in the residual assets of the company on liquidation. Whenever one of his direct rights is infringed, the shareholder has an independent right of action. On this there is no disagreement between the Parties. But a distinction must be drawn between a direct infringement of the shareholder's rights, and difficulties or financial losses to which he may be exposed as the result of the situation of the company.

48. The Belgian Government claims that shareholders of Belgian nationality suffered damage in consequence of unlawful acts of the Spanish authorities and, in particular, that the Barcelona Traction shares, though they did not cease to exist, were emptied of all real economic content. It accordingly contends that the shareholders had an independent right to redress, notwithstanding the fact that the acts complained of were directed against the company as such. Thus the legal issue is reducible to the question of whether it is legitimate to identify an attack on company rights, resulting in damage to shareholders, with the violation of their direct rights.

49. The Court has noted from the Application, and from the reply given by Counsel on 8 July 1969, that the Belgian Government did not base its claim on an infringement of the direct rights of the shareholders. Thus it is not open to the Court to go beyond the claim as formulated by the Belgian Government and it will not pursue its examination of this point any further.

50. In turning now to the international legal aspects of the case, the Court must, as already indicated, start from the fact that the present case essentially involves factors derived from municipal law—the distinction and the community between the company and the shareholder—which the Parties, however widely their interpretations may differ, each take as the point of

departure of their reasoning. If the Court were to decide the case in disregard of the relevant institutions of municipal law it would, without justification, invite serious legal difficulties. It would lose touch with reality, for there are no corresponding institutions of international law to which the Court could resort. Thus the Court has, as indicated, not only to take cognizance of municipal law but also to refer to it. It is to rules generally accepted by municipal legal systems which recognize the limited company whose capital is represented by shares, and not to the municipal law of a particular State, that international law refers. In referring to such rules, the Court cannot modify, still less deform them.

51. On the international plane, the Belgian Government has advanced the proposition that it is inadmissible to deny the shareholders' national State a right of diplomatic protection merely on the ground that another State possesses a corresponding right in respect of the company itself. In strict logic and law this formulation of the Belgian claim to *jus standi* assumes the existence of the very right that requires demonstration. In fact the Belgian Government has repeatedly stressed that there exists no rule of international law which would deny the national State of the shareholders the right of diplomatic protection for the purpose of seeking redress pursuant to unlawful acts committed by another State against the company in which they hold shares. This, by emphasizing the absence of any express denial of the right, conversely implies the admission that there is no rule of international law which expressly confers such a right on the shareholders' national State.

52. International law may not, in some fields, provide specific rules in particular cases. In the concrete situation, the company against which allegedly unlawful acts were directed is expressly vested with a right, whereas no such right is specifically provided for the shareholder in respect of those acts. Thus the position of the company rests on a positive rule of both municipal and international law. As to the shareholder, while he has certain rights expressly provided for him by municipal law as referred to in paragraph 42 above, appeal can, in the circumstances of the present case, only be made to the silence of international law. Such silence scarcely admits of interpretation in favour of the shareholder.

53. It is quite true, as was recalled in the course of oral argument in the present case, that concurrent claims are not excluded in the case of a person who, having entered the service of an international organization and retained his nationality, enjoys simultaneously the right to be protected by his national State and the right to be protected by the organization to which he belongs. This however is a case of one person in possession of two separate bases of protection, each of which is valid (*Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, I.C.J. Reports 1949, p. 185*). There is no analogy between such a situation and that of foreign shareholders in a company which has been the victim of a violation of international law which has caused them damage.

54. Part of the Belgian argument is founded on an attempt to assimilate interests to rights, relying on the use in many treaties and other instruments of such expressions as property, rights and interests. This is not, however,

conclusive. Property is normally protected by law. Rights are *ex hypothesi* protected by law, otherwise they would not be rights. According to the Belgian Government, interests, although distinct from rights, are also protected by the aforementioned conventional rules. The Court is of the opinion that, for the purpose of interpreting the general rule of international law concerning diplomatic protection, which is its task, it has no need to determine the meaning of the term interests in the conventional rules, in other words to determine whether by this term the conventional rules refer to rights rather than simple interests.

55. The Court will now examine other grounds on which it is conceivable that the submission by the Belgian Government of a claim on behalf of shareholders in Barcelona Traction may be justified.

56. For the same reasons as before, the Court must here refer to municipal law. Forms of incorporation and their legal personality have sometimes not been employed for the sole purposes they were originally intended to serve; sometimes the corporate entity has been unable to protect the rights of those who entrusted their financial resources to it; thus inevitably there have arisen dangers of abuse, as in the case of many other institutions of law. Here, then, as elsewhere, the law, confronted with economic realities, has had to provide protective measures and remedies in the interests of those within the corporate entity as well as of those outside who have dealings with it: the law has recognized that the independent existence of the legal entity cannot be treated as an absolute. It is in this context that the process of "lifting the corporate veil" or "disregarding the legal entity" has been found justified and equitable in certain circumstances or for certain purposes. The wealth of practice already accumulated on the subject in municipal law indicates that the veil is lifted, for instance, to prevent the misuse of the privileges of legal personality, as in certain cases of fraud or malfeasance, to protect third persons such as a creditor or purchaser, or to prevent the evasion of legal requirements or of obligations.

57. Hence the lifting of the veil is more frequently employed from without, in the interest of those dealing with the corporate entity. However, it has also been operated from within, in the interest of—among others—the shareholders, but only in exceptional circumstances.

58. In accordance with the principle expounded above, the process of lifting the veil, being an exceptional one admitted by municipal law in respect of an institution of its own making, is equally admissible to play a similar role in international law. It follows that on the international plane also there may in principle be special circumstances which justify the lifting of the veil in the interest of shareholders.

59. Before proceeding, however, to consider whether such circumstances exist in the present case, it will be advisable to refer to two specific cases involving encroachment upon the legal entity, instances of which have been cited by the Parties. These are: first, the treatment of enemy and allied property, during and after the First and Second World Wars, in peace treaties and other international instruments; secondly, the treatment of

foreign property consequent upon the nationalizations carried out in recent years by many States.

60. With regard to the first, enemy-property legislation was an instrument of economic warfare, aimed at denying the enemy the advantages to be derived from the anonymity and separate personality of corporations. Hence the lifting of the veil was regarded as justified *ex necessitate* and was extended to all entities which were tainted with enemy character, even the nationals of the State enacting the legislation. The provisions of the peace treaties had a very specific function: to protect allied property, and to seize and pool enemy property with a view to covering reparation claims. Such provisions are basically different in their rationale from those normally applicable.

61. Also distinct are the various arrangements made in respect of compensation for the nationalization of foreign property. Their rationale too, derived as it is from structural changes in a State's economy, differs from that of any normally applicable provisions. Specific agreements have been reached to meet specific situations, and the terms have varied from case to case. Far from evidencing any norm as to the classes of beneficiaries of compensation, such arrangements are *sui generis* and provide no guide in the present case.

62. Nevertheless, during the course of the proceedings both Parties relied on international instruments and judgments of international tribunals concerning these two specific areas. It should be clear that the developments in question have to be viewed as distinctive processes, arising out of circumstances peculiar to the respective situations. To seek to draw from them analogies or conclusions held to be valid in other fields is to ignore their specific character as *lex specialis* and hence to court error.

63. The Parties have also relied on the general arbitral jurisprudence which has accumulated in the last half-century. However, in most cases the decisions cited rested upon the terms of instruments establishing the jurisdiction of the tribunal or claims commission and determining what rights might enjoy protection; they cannot therefore give rise to generalization going beyond the special circumstances of each case. Other decisions, allowing or disallowing claims by way of exception, are not, in view of the particular facts concerned, directly relevant to the present case.

64. The Court will now consider whether there might not be, in the present case, other special circumstances for which the general rule might not take effect. In this connection two particular situations must be studied: the case of the company having ceased to exist and the case of the company's national State lacking capacity to take action on its behalf.

65. As regards the first of these possibilities the Court observes that the Parties have put forward conflicting interpretations of the present situation of Barcelona Traction. There can, however, be no question but that Barcelona Traction has lost all its assets in Spain, and was placed in receivership in Canada, a receiver and manager having been appointed. It is common ground that from the economic viewpoint the company has been entirely paralyzed. It has been deprived of all its Spanish sources

of income, and the Belgian Government has asserted that the company could no longer find the funds for its legal defence, so that these had to be supplied by the shareholders.

66. It cannot, however, be contended that the corporate entity of the company has ceased to exist, or that it has lost its capacity to take corporate action. It was free to exercise such capacity in the Spanish courts and did in fact do so. It has not become incapable in law of defending its own rights and the interests of the shareholders. In particular, a precarious financial situation cannot be equated with the demise of the corporate entity, which is the hypothesis under consideration: the company's status in law is alone relevant, and not its economic condition, nor even the possibility of its being "practically defunct"—a description on which argument has been based but which lacks all legal precision. Only in the event of the legal demise of the company are the shareholders deprived of the possibility of a remedy available through the company; it is only if they became deprived of all such possibility that an independent right of action for them and their government could arise.

67. In the present case, Barcelona Traction is in receivership in the country of incorporation. Far from implying the demise of the entity or of its rights, this much rather denotes that those rights are preserved for so long as no liquidation has ensued. Though in receivership, the company continues to exist. Moreover, it is a matter of public record that the company's shares were quoted on the stock-market at a recent date.

68. The reason for the appointment in Canada not only of a receiver but also of a manager was explained as follows:

"In the Barcelona Traction case it was obvious, in view of the Spanish bankruptcy order of 12 February 1948, that the appointment of only a receiver would be useless, as positive steps would have to be taken if any assets seized in the bankruptcy in Spain were to be recovered."  
(Hearing of 2 July 1969.)

In brief, a manager was appointed in order to safeguard the company's rights; he has been in a position directly or indirectly to uphold them. Thus, even if the company is limited in its activity after being placed in receivership, there can be no doubt that it has retained its legal capacity and that the power to exercise it is vested in the manager appointed by the Canadian courts. The Court is thus not confronted with the first hypothesis contemplated in paragraph 64, and need not pronounce upon it.

69. The Court will now turn to the second possibility, that of the lack of capacity of the company's national State to act on its behalf. The first question which must be asked here is whether Canada—the third apex of the triangular relationship—is, in law, the national State of Barcelona Traction.

70. In allocating corporate entities to States for purposes of diplomatic protection, international law is based, but only to a limited extent, on an analogy with the rules governing the nationality of individuals. The traditional rule attributes the right of diplomatic protection of a corporate entity

to the State under the laws of which it is incorporated and in whose territory it has its registered office. These two criteria have been confirmed by long practice and by numerous international instruments. This notwithstanding, further or different links are at times said to be required in order that a right of diplomatic protection should exist. Indeed, it has been the practice of some States to give a company incorporated under their law diplomatic protection solely when it has its seat (*siège social*) or management or centre of control in their territory, or when a majority or a substantial proportion of the shares has been owned by nationals of the State concerned. Only then, it has been held, does there exist between the corporation and the State in question a genuine connection of the kind familiar from other branches of international law. However, in the particular field of the diplomatic protection of corporate entities, no absolute test of the "genuine connection" has found general acceptance. Such tests as have been applied are of a relative nature, and sometimes links with one State have had to be weighed against those with another. In this connection reference has been made to the *Nottebohm* case. In fact the Parties made frequent reference to it in the course of the proceedings. However, given both the legal and factual aspects of protection in the present case the Court is of the opinion that there can be no analogy with the issues raised or the decision given in that case.

71. In the present case, it is not disputed that the company was incorporated in Canada and has its registered office in that country. The incorporation of the company under the law of Canada was an act of free choice. Not only did the founders of the company seek its incorporation under Canadian law but it has remained under that law for a period of over fifty years. It has maintained in Canada its registered office, its accounts and its share registers. Board meetings were held there for many years; it has been listed in the records of the Canadian tax authorities. Thus a close and permanent connection has been established, fortified by the passage of over half a century. This connection is in no way weakened by the fact that the company engaged from the very outset in commercial activities outside Canada, for that was its declared object. Barcelona Traction's links with Canada are thus manifold.

72. Furthermore, the Canadian nationality of the company has received general recognition. Prior to the institution of proceedings before the Court, three other governments apart from that of Canada (those of the United Kingdom, the United States and Belgium) made representations concerning the treatment accorded to Barcelona Traction by the Spanish authorities. The United Kingdom Government intervened on behalf of bondholders and of shareholders. Several representations were also made by the United States Government, but not on behalf of the Barcelona Traction company as such.

73. Both governments acted at certain stages in close co-operation with the Canadian Government. An agreement was reached in 1950 on the setting-up of an independent committee of experts. While the Belgian



and Canadian Governments contemplated a committee composed of Belgian, Canadian and Spanish members, the Spanish Government suggested a committee composed of British, Canadian and Spanish members. This was agreed to by the Canadian and United Kingdom Governments, and the task of the committee was, in particular, to establish the monies imported into Spain by Barcelona Traction or any of its subsidiaries, to determine and appraise the materials and services brought into the country, to determine and appraise the amounts withdrawn from Spain by Barcelona Traction or any of its subsidiaries, and to compute the profits earned in Spain by Barcelona Traction or any of its subsidiaries and the amounts susceptible of being withdrawn from the country at 31 December 1949.

74. As to the Belgian Government, its earlier action was also undertaken in close co-operation with the Canadian Government. The Belgian Government admitted the Canadian character of the company in the course of the present proceedings. It is explicitly stated that Barcelona Traction was a company of neither Spanish nor Belgian nationality but a Canadian company incorporated in Canada. The Belgian Government has even conceded that it was not concerned with the injury suffered by Barcelona Traction itself, since that was Canada's affair.

75. The Canadian Government itself, which never appears to have doubted its right to intervene on the company's behalf, exercised the protection of Barcelona Traction by diplomatic representation for a number of years, in particular by its note of 27 March 1948, in which it alleged that a denial of justice had been committed in respect of the Barcelona Traction, Ebro and National Trust companies, and requested that the bankruptcy judgment be cancelled. It later invoked the Anglo-Spanish treaty of 1922 and the agreement of 1924, which applied to Canada. Further Canadian notes were addressed to the Spanish Government in 1950, 1951 and 1952. Further approaches were made in 1954, and in 1955 the Canadian Government renewed the expression of its deep interest in the affair of Barcelona Traction and its Canadian subsidiaries.

76. In sum, the record shows that from 1948 onwards the Canadian Government made to the Spanish Government numerous representations which cannot be viewed otherwise than as the exercise of diplomatic protection in respect of the Barcelona Traction company. Therefore this was not a case where diplomatic protection was refused or remained in the sphere of fiction. It is also clear that over the whole period of its diplomatic activity the Canadian Government proceeded in full knowledge of the Belgian attitude and activity.

77. It is true that at a certain point the Canadian Government ceased to act on behalf of Barcelona Traction, for reasons which have not been fully revealed, though a statement made in a letter of 19 July 1955 by the Canadian Secretary of State for External Affairs suggests that it felt the matter should be settled by means of private negotiations. The Canadian Government has nonetheless retained its capacity to exercise diplomatic protection; no legal impediment has prevented it from doing so;

no fact has arisen to render this protection impossible. It has discontinued its action of its own free will.

78. The Court would here observe that, within the limits prescribed by international law, a State may exercise diplomatic protection by whatever means and to whatever extent it thinks fit, for it is its own right that the State is asserting. Should the natural or legal persons on whose behalf it is acting consider that their rights are not adequately protected, they have no remedy in international law. All they can do is to resort to municipal law, if means are available, with a view to furthering their cause or obtaining redress. The municipal legislator may lay upon the State an obligation to protect its citizens abroad, and may also confer upon the national a right to demand the performance of that obligation, and clothe the right with corresponding sanctions. However, all these questions remain within the province of municipal law and do not affect the position internationally.

79. The State must be viewed as the sole judge to decide whether its protection will be granted, to what extent it is granted, and when it will cease. It retains in this respect a discretionary power the exercise of which may be determined by considerations of a political or other nature, unrelated to the particular case. Since the claim of the State is not identical with that of the individual or corporate person whose cause is espoused, the State enjoys complete freedom of action. Whatever the reasons for any change of attitude, the fact cannot in itself constitute a justification for the exercise of diplomatic protection by another government, unless there is some independent and otherwise valid ground for that.

80. This cannot be regarded as amounting to a situation where a violation of law remains without remedy: in short, a legal vacuum. There is no obligation upon the possessors of rights to exercise them. Sometimes no remedy is sought, though rights are infringed. To equate this with the creation of a vacuum would be to equate a right with an obligation.

81. The cessation by the Canadian Government of the diplomatic protection of Barcelona Traction cannot, then, be interpreted to mean that there is no remedy against the Spanish Government for the damage done by the allegedly unlawful acts of the Spanish authorities. It is not a hypothetical right which was vested in Canada, for there is no legal impediment preventing the Canadian Government from protecting Barcelona Traction. Therefore there is no substance in the argument that for the Belgian Government to bring a claim before the Court represented the only possibility of obtaining redress for the damage suffered by Barcelona Traction and, through it, by its shareholders.

82. Nor can the Court agree with the view that the Canadian Government had of necessity to interrupt the protection it was giving to Barcelona Traction, and to refrain from pursuing it by means of other procedures, solely because there existed no link of compulsory jurisdiction between Spain and Canada. International judicial proceedings are but one of the means available to States in pursuit of their right to exercise diplomatic protection (*Reparation for Injuries Suffered in the Service of the United*

*Nations, Advisory Opinion, I.C.J. Reports 1949, p. 178*). The lack of a jurisdictional link cannot be regarded either in this or in other fields of international law as entailing the non-existence of a right.

83. The Canadian Government's right of protection in respect of the Barcelona Traction company remains unaffected by the present proceedings. The Spanish Government has never challenged the Canadian nationality of the company, either in the diplomatic correspondence with the Canadian Government or before the Court. Moreover it has unreservedly recognized Canada as the national State of Barcelona Traction in both written pleadings and oral statements made in the course of the present proceedings. Consequently, the Court considers that the Spanish Government has not questioned Canada's right to protect the company.

84. Though, having regard to the character of the case, the question of Canada's right has not been before it, the Court has considered it necessary to clarify this issue.

85. The Court will now examine the Belgian claim from a different point of view, disregarding municipal law and relying on the rule that in inter-State relations, whether claims are made on behalf of a State's national or on behalf of the State itself, they are always the claims of the State. As the Permanent Court said,

"The question, therefore, whether the . . . dispute originates in an injury to a private interest, which in point of fact is the case in many international disputes, is irrelevant from this standpoint." (*Mavromatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2, p. 12. See also Nottebohm, Second Phase, Judgment, I.C.J. Reports 1955, p. 24.*)

86. Hence the Belgian Government would be entitled to bring a claim if it could show that one of its rights had been infringed and that the acts complained of involved the breach of an international obligation arising out of a treaty or a general rule of law. The opinion has been expressed that a claim can accordingly be made when investments by a State's nationals abroad are thus prejudicially affected, and that since such investments are part of a State's national economic resources, any prejudice to them directly involves the economic interest of the State.

87. Governments have been known to intervene in such circumstances not only when their interests were affected, but also when they were threatened. However, it must be stressed that this type of action is quite different from and outside the field of diplomatic protection. When a State admits into its territory foreign investments or foreign nationals it is, as indicated in paragraph 33, bound to extend to them the protection of the law. However, it does not thereby become an insurer of that part of another State's wealth which these investments represent. Every investment of this kind carries certain risks. The real question is whether a right has been violated, which right could only be the right of the State to have its nationals enjoy a certain treatment guaranteed by general international law, in the absence of a treaty applicable to the particular case. On the other hand it has been stressed that it must be proved that the

investment effectively belongs to a particular economy. This is, as it is admitted, sometimes very difficult, in particular where complex undertakings are involved. Thus the existing concrete test would be replaced by one which might lead to a situation in which no diplomatic protection could be exercised, with the consequence that an unlawful act by another State would remain without remedy.

38. It follows from what has already been stated above that, where it is a question of an unlawful act committed against a company representing foreign capital, the general rule of international law authorizes the national State of the company alone to make a claim.

39. Considering the important developments of the last half-century, the growth of foreign investments and the expansion of the international activities of corporations, in particular of holding companies, which are often multinational, and considering the way in which the economic interests of States have proliferated, it may at first sight appear surprising that the evolution of law has not gone further and that no generally accepted rules in the matter have crystallized on the international plane. Nevertheless, a more thorough examination of the facts shows that the law on the subject has been formed in a period characterized by an intense conflict of systems and interests. It is essentially bilateral relations which have been concerned, relations in which the rights of both the State exercising diplomatic protection and the State in respect of which protection is sought have had to be safeguarded. Here as elsewhere, a body of rules could only have developed with the consent of those concerned. The difficulties encountered have been reflected in the evolution of the law on the subject.

40. Thus, in the present state of the law, the protection of shareholders requires that recourse be had to treaty stipulations or special agreements directly concluded between the private investor and the State in which the investment is placed. States ever more frequently provide for such protection, in both bilateral and multilateral relations, either by means of special instruments or within the framework of wider economic arrangements. Indeed, whether in the form of multilateral or bilateral treaties between States, or in that of agreements between States and companies, there has since the Second World War been considerable development in the protection of foreign investments. The instruments in question contain provisions as to jurisdiction and procedure in case of disputes concerning the treatment of investing companies by the States in which they invest capital. Sometimes companies are themselves vested with a direct right to defend their interests against States through prescribed procedures. No such instrument is in force between the Parties to the present case.

41. With regard more particularly to human rights, to which reference has already been made in paragraph 34 of this Judgment, it should be noted that these also include protection against denial of justice. However, on the universal level, the instruments which embody human rights do not confer on States the capacity to protect the victims of infringements of such rights irrespective of their nationality. It is therefore still on the regional level that a solution to this problem has had to be sought; thus,

within the Council of Europe, of which Spain is not a member, the problem of admissibility encountered by the claim in the present case has been resolved by the European Convention on Human Rights, which entitles each State which is a party to the Convention to lodge a complaint against any other contracting State for violation of the Convention, irrespective of the nationality of the victim.

92. Since the general rule on the subject does not entitle the Belgian Government to put forward a claim in this case, the question remains to be considered whether nonetheless, as the Belgian Government has contended during the proceedings, considerations of equity do not require that it be held to possess a right of protection. It is quite true that it has been maintained, that, for reasons of equity, a State should be able, in certain cases, to take up the protection of its nationals, shareholders in a company which has been the victim of a violation of international law. Thus a theory has been developed to the effect that the State of the shareholders has a right of diplomatic protection when the State whose responsibility is invoked is the national State of the company. Whatever the validity of this theory may be, it is certainly not applicable to the present case, since Spain is not the national State of Barcelona Traction.

93. On the other hand, the Court considers that, in the field of diplomatic protection as in all other fields of international law, it is necessary that the law be applied reasonably. It has been suggested that if in a given case it is not possible to apply the general rule that the right of diplomatic protection of a company belongs to its national State, considerations of equity might call for the possibility of protection of the shareholders in question by their own national State. This hypothesis does not correspond to the circumstances of the present case.

94. In view, however, of the discretionary nature of diplomatic protection, considerations of equity cannot require more than the possibility for some protector State to intervene, whether it be the national State of the company, by virtue of the general rule mentioned above, or, in a secondary capacity, the national State of the shareholders who claim protection. In this connection, account should also be taken of the practical effects of deducing from considerations of equity any broader right of protection for the national State of the shareholders. It must first of all be observed that it would be difficult on an equitable basis to make distinctions according to any quantitative test: it would seem that the owner of 1 per cent. and the owner of 90 per cent. of the share-capital should have the same possibility of enjoying the benefit of diplomatic protection. The protector State may, of course, be disinclined to take up the case of the single small shareholder, but it could scarcely be denied the right to do so in the name of equitable considerations. In that field, protection by the national State of the shareholders can hardly be graduated according to the absolute or relative size of the shareholding involved.

95. The Belgian Government, it is true, has also contended that as high a proportion as 88 per cent. of the shares in Barcelona Traction belonged to natural or juristic persons of Belgian nationality, and it has

used this as an argument for the purpose not only of determining the amount of the damages which it claims, but also of establishing its right of action on behalf of the Belgian shareholders. Nevertheless, this does not alter the Belgian Government's position, as expounded in the course of the proceedings, which implies, in the last analysis, that it might be sufficient for one single share to belong to a national of a given State for the latter to be entitled to exercise its diplomatic protection.

96. The Court considers that the adoption of the theory of diplomatic protection of shareholders as such, by opening the door to competing diplomatic claims, could create an atmosphere of confusion and insecurity in international economic relations. The danger would be all the greater inasmuch as the shares of companies whose activity is international are widely scattered and frequently change hands. It might perhaps be claimed that, if the right of protection belonging to the national States of the shareholders were considered as only secondary to that of the national State of the company, there would be less danger of difficulties of the kind contemplated. However, the Court must state that the essence of a secondary right is that it only comes into existence at the time when the original right ceases to exist. As the right of protection vested in the national State of the company cannot be regarded as extinguished because it is not exercised, it is not possible to accept the proposition that in case of its non-exercise the national States of the shareholders have a right of protection secondary to that of the national State of the company. Furthermore, study of factual situations in which this theory might possibly be applied gives rise to the following observations.

97. The situations in which foreign shareholders in a company wish to have recourse to diplomatic protection by their own national State may vary. It may happen that the national State of the company simply refuses to grant it its diplomatic protection, or that it begins to exercise it (as in the present case) but does not pursue its action to the end. It may also happen that the national State of the company and the State which has committed a violation of international law with regard to the company arrive at a settlement of the matter, by agreeing on compensation for the company, but that the foreign shareholders find the compensation insufficient. Now, as a matter of principle, it would be difficult to draw a distinction between these three cases so far as the protection of foreign shareholders by their national State is concerned, since in each case they may have suffered real damage. Furthermore, the national State of the company is perfectly free to decide how far it is appropriate for it to protect the company, and is not bound to make public the reasons for its decision. To reconcile this discretionary power of the company's national State with a right of protection falling to the shareholders' national State would be particularly difficult when the former State has concluded, with the State which has contravened international law with regard to the company, an agreement granting the company compensation which the foreign shareholders find inadequate. If, after such a settlement, the national State of the foreign shareholders could in its turn put forward a claim based on

the same facts, this would be likely to introduce into the negotiation of this kind of agreement a lack of security which would be contrary to the stability which it is the object of international law to establish in international relations.

98. It is quite true, as recalled in paragraph 53, that international law recognizes parallel rights of protection in the case of a person in the service of an international organization. Nor is the possibility excluded of concurrent claims being made on behalf of persons having dual nationality, although in that case lack of a genuine link with one of the two States may be set up against the exercise by that State of the right of protection. It must be observed, however, that in these two types of situation the number of possible protectors is necessarily very small, and their identity normally not difficult to determine. In this respect such cases of dual protection are markedly different from the claims to which recognition of a general right of protection of foreign shareholders by their various national States might give rise.

99. It should also be observed that the promoters of a company whose operations will be international must take into account the fact that States have, with regard to their nationals, a discretionary power to grant diplomatic protection or to refuse it. When establishing a company in a foreign country, its promoters are normally impelled by particular considerations; it is often a question of tax or other advantages offered by the host State. It does not seem to be in any way inequitable that the advantages thus obtained should be balanced by the risks arising from the fact that the protection of the company and hence of its shareholders is thus entrusted to a State other than the national State of the shareholders.

100. In the present case, it is clear from what has been said above that Barcelona Traction was never reduced to a position of impotence such that it could not have approached its national State, Canada, to ask for its diplomatic protection, and that, as far as appeared to the Court, there was nothing to prevent Canada from continuing to grant its diplomatic protection to Barcelona Traction if it had considered that it should do so.

101. For the above reasons, the Court is not of the opinion that, in the particular circumstances of the present case, *jus standi* is conferred on the Belgian Government by considerations of equity.

102. In the course of the proceedings, the Parties have submitted a great amount of documentary and other evidence intended to substantiate their respective submissions. Of this evidence the Court has taken cognizance. It has been argued on one side that unlawful acts had been committed by the Spanish judicial and administrative authorities, and that as a result of those acts Spain has incurred international responsibility. On the other side it has been argued that the activities of Barcelona Traction and its subsidiaries were conducted in violation of Spanish law and caused damage to the Spanish economy. If both contentions were substantiated, the truth of the latter would in no way provide justification in respect of the former. The Court fully appreciates the importance of the legal problems raised by the allegation, which is at the root of the Belgian claim for reparation,

concerning the denials of justice allegedly committed by organs of the Spanish State. However, the possession by the Belgian Government of a right of protection is a prerequisite for the examination of these problems. Since no *jus standi* before the Court has been established, it is not for the Court in its Judgment to pronounce upon any other aspect of the case, on which it should take a decision only if the Belgian Government had a right of protection in respect of its nationals, shareholders in Barcelona Traction.

103. Accordingly,

THE COURT

rejects the Belgian Government's claim by fifteen votes to one, twelve votes of the majority being based on the reasons set out in the present Judgment.

Judge *ad hoc* Riphagen rendered a dissenting opinion. Judges Petré and Onyeama appended a joint declaration to the Judgment, and Judge Lachs appended a declaration. President Bustamante y Rivero, and Judges Sir Gerald Fitzmaurice, Tanaka, Jessup, Morelli, Padilla Nervo, Gros and Ammoun gave separate opinions, concurring in the result. Judges Tanaka, Jessup and Gros did not join in the reasoning of the majority opinion as to lack of standing of the national state of shareholders. Judge Tanaka thought the Belgian claim of denial of justice was unfounded. Judge Gros held that it was the state whose national economy was adversely affected that possessed the right to take action, but that proof of Barcelona Traction's appurtenance to the Belgian economy had not been produced.

Judge Jessup believed that the Court should have gone more fully into the several objections which had been raised to the Belgian case. He pointed out that this controversy, in the field of state responsibility, did not involve "any conflict between great capital-exporting States and States in course of development. Belgium and Spain are States which, in these terms, belong to the same grouping. . . . This case cannot be said to evoke problems of 'neo-colonialism'."

He said: "If in the anti-trust, product-liability and other situations, the corporate veil is freely pierced to assert the State's jurisdictional power, why should it not also be pierced to determine the State's responsibility to the interests actually injured by action damaging to a foreign enterprise? In the instant case, Spain asserted its power to deal with Barcelona Traction's subsidiaries in Spain, disregarding the Canadian nationality of Ebro and others. The equitable balance of legal interests permits Belgium to pierce the veil of the Canadian 'charter of convenience' and to assert the real interests of the shareholders—assuming of course that their continuous Belgian character is established." "The overwhelmingly dominant feature in the affairs of Barcelona Traction was not the fact of incorporation in Canada, but the controlling influence of far-flung international financial interests manifested in the Sofina grouping."

Judge Jessup summarized his conclusions in his paragraph 18: "The decision of the Court, in this case, is based on the legal conclusion that only Canada had a right to present a diplomatic claim on behalf of Barcelona Traction which was a company of Canadian nationality. My own conclusion is that . . . Canada did not have, in this case, a right to claim on behalf of Barcelona Traction. As a matter of general international law, it is also my conclusion that a State, under certain circumstances, has a right to present a diplomatic claim on behalf of shareholders



who are its nationals. As a matter of proof of fact, I find that Belgium did not succeed in proving the Belgian nationality, between the critical dates, of those natural and juristic persons on whose behalf it sought to claim. The Belgian claim must therefore be rejected."

He continued:

50. There are three situations in which there is wide agreement that a State may extend its diplomatic protection to shareholders who are its nationals, although the company whose shares they hold has the nationality of another State. These three situations are sometimes considered "exceptions" to a general rule allowing protection of the corporation itself.

51. The first of these situations is where the corporation has been incorporated in the State which inflicts the injury on it without legal justification, and where the shareholders are of another nationality.

It is in such situations that one finds the widest agreement that a State may extend diplomatic protection to shareholders who are its nationals.<sup>1</sup> The rationale seems to be based largely on equitable considerations and the result is so reasonable it has been accepted in State practice. Judge Charles De Visscher says this result is required by "des considérations impérieuses de justice". ("De la protection diplomatique des actionnaires d'une société contre l'Etat sous la législation duquel cette société s'est constituée", 61 *Revue de droit international et de législation comparée*, 1934, p. 624. By hypothesis, the respondent State has committed an unlawful act from which injury results. The corporation itself cannot seek redress and therefore the State whose nationals own the shares may protect them *ut singuli*. The equities are particularly striking when the respondent State admits foreign investment only on condition that the investors form a corporation under its law. These points are clearly made by Petrén, 109 *Hague Recueil*, 1963, II, pp. 506 and 510. Petrén refers with approval to the earlier lectures by Paul De Visscher, 102 *Hague Recueil*, 1961, I, p. 399; see especially pp. 478-479.

Judge Wellington Koo, in his separate opinion in this *Barcelona* case in 1964 asserted emphatically:

"... the original simple rule of protection of a company by its national State has been found inadequate and State practice, treaty regulation and international arbitral decisions have come to recognize the right of a State to intervene on behalf of its nationals, share-

<sup>1</sup>The Respondent here shares in this agreement. Bindschedler-Robert, (*op. cit.*, p. 174), writing in 1964, considered that this view was being accepted in international law. She cites the well-reasoned and well-documented study by Kiss, "La protection diplomatique des actionnaires dans la jurisprudence et la pratique internationale", in *La personnalité moral et ses limites*, (1960), p. 179. Kiss indeed cites abundant authority for even broader rights to protect shareholders; he refers to Borchard, Ch. De Visscher, Sibert, Ralston, Fitzmaurice, Pinto, Paul De Visscher, Perry, Sfériades, Jones, Guggenheim, Battagliani, Bindschedler, but query whether all these carry their conclusion as far as does Kiss. See also in support of the broader rule allowing protection of shareholders, Agrawala, "State Protection of Shareholders' Interests in Foreign Corporations", *The Solicitor's Quarterly*, 1962, p. 13; Nial, "Problems of Private International Law", 101 *Hague Recueil*, 1960, III, p. 259. [Judge Jessup's footnote.]

holders of a company which has been injured by the State of its own nationality, that is to say, a State where it has been incorporated according to its laws and therefore is regarded as having assumed its nationality" (*I.C.J. Reports* 1964, p. 58).

Judge Wellington Koo considered it immaterial whether this rule should or should not be considered as an "exception".

52. It is curious that this "exception" should have been so widely accepted since it ignores the traditional rule that a State is not guilty of a breach of international law for injuring one of its own nationals. It rebuts also the notion that an injury to a corporation is not a direct injury to the shareholders. Moreover, if the foreign shareholders may be protected in such a situation, it is also necessary to choose one horn of a dilemma: either one admits that the right of the shareholders existed at the moment when the injury was done to the corporation, which means that the rights of shareholders may be damaged by an injury to the corporation, or, if that right came into existence subsequently, then one ignores the rule of international law that a claim must be national in origin. Moreover, the admission of this "exception" negates the argument, sometimes advanced against the diplomatic protection of shareholders, to the effect that such claims expose an accused State to a vast variety of claims on behalf of persons of whose existence it was ignorant. Since customary practice has, however, accepted this "exception", other arguments against protection of shareholders are correspondingly weakened, especially since the doctrine in question generally does not insist that the life of the corporation must have been extinguished so that it could be said the shareholders had acquired a direct right to the assets.

53. The second situation in which it is widely agreed that a State may claim on behalf of its shareholders in a foreign corporation, is where the State of incorporation has liquidated or wound up the corporation after the injury was inflicted by some third State.

This situation differs from that just considered in that the respondent State has committed its unlawful act (let us say total confiscation) against a foreign corporation. Here some doctrine would say that ordinarily State A, the State of incorporation, should be the one to extend diplomatic protection. But by hypothesis the corporate life has been extinguished by State A, so that—just as in the first situation—a claim can not be pressed for the corporation. Brownlie states the situation as follows:

"Where the State under the law of which the company is incorporated terminates the existence of the company in law, or other circumstances make the company practically defunct, the shareholders remain as the interests affected by government act: intervention on their behalf would seem to be justified in such a case." (Brownlie, *Principles of Public International Law*, 1966, p. 401.)

Here it may be said that after liquidation and payment of creditors, the shareholders—under an applicable system of municipal law—have a

property interest in the assets and for that reason may be protected. But at the time of the unlawful act ("confiscation") they did not have such a property interest and therefore under the rule of continuity the claim did not have in origin the appropriate nationality on that basis.

54. But Brownlie equates the case of the termination of the existence of the company with the case where it is "practically defunct". This is a term which was used by the British Government in the *Delagoa Bay* case and used a good deal by the Parties in their pleading in the instant case. Its exact meaning is not clear but Barcelona Traction did have some life in Canada even after the practical annihilation in Spain. From 1948 on it was under a receivership, but the "appointment of a receiver and manager over the assets and business of a company does not dissolve or annihilate the company . . ." (Kerr, *On the Law and Practice as to Receivers*, Thirteenth ed. by Walton, 1963, p. 232). As already noted, the Receiver and Manager of Barcelona Traction concerned himself only with promoting negotiations for a settlement between the private parties; none of the public utility enterprises in Spain were under his direction or within his control; and he had to borrow the money for his operations from an affiliate or subsidiary of the Belgian company, Sidro.

It is true that after 1948 there was some trading in Barcelona Traction shares on the Brussels Bourse (Verbatim Record for 7 July 1969), and according to *Moody's Manual of Investments*, for years ranging from 1952 to 1967, there were sales in New York, Canada and London. No information is available to make it possible to say whether the transactions were merely speculative, but it may be noted that in 1961, when the first Belgian Application was withdrawn from this Court in expectation of a private negotiated settlement, the quoted price was somewhat higher.

55. It is true that so far as Canadian law is concerned, the shareholders had not yet acquired a direct right to the assets but since I do not base my conclusion on this factor, I do not pursue it further.

56. I also find it unnecessary to consider in detail what is considered the third "exception" where shareholders may admittedly be protected, namely where the injury is inflicted directly on the shareholders and not indirectly through damage to the company.

57. It is now possible to turn to the question which is crucial for the instant case, namely, whether the three situations just mentioned are the only ones in which international law permits a State to extend diplomatic protection to shareholders who are its nationals.

I find no evidence or reasoning which precludes such protection in other situations, but the question can be answered only by analysing the fundamental principles underlying the right of diplomatic protection.

## UNITED STATES CASE NOTES

*Jurisdiction—objective territorial jurisdiction—inducing person to travel in interstate commerce in execution of scheme to obtain money by false pretenses—acquisition of jurisdiction over persons—KER rule*

CHARRON v. UNITED STATES. 412 F.2d 657.

U.S. Court of Appeals, 9th Cir., June 9, 1969.

Appellant was convicted by a jury of devising a fraudulent scheme whereby the complaining witness traveled from Mexico City to the latter's home in the State of Washington to obtain \$50,000 and thence back to Mexico City where the money was delivered to appellant and a confederate. This scheme is known as the "pigeon drop." Five years later, appellant was arrested by United States Federal agents in Detroit while *en route* from Mexico City to Toronto. He was charged with a violation of 18 U.S.C. § 2314, par. 2, inducing a person to travel in interstate commerce in the execution of a scheme to obtain money by false pretenses.<sup>1</sup> The appellant sought review on the following issues, *inter alia*:

1. Did the Government fail to charge or prove the commission of a crime under 18 U.S.C. 2314, where admittedly all of the overt acts alleged to have been committed by appellant occurred beyond the territorial boundaries of the United States?
2. Did the Government's mode of acquiring custody and personal jurisdiction of appellant offend constitutional guarantees?<sup>2</sup>

The Court of Appeals held that there was no merit in the points raised and affirmed the conviction.

With regard to the first question, Judge Hamlin observed that, although the appellant was in Mexico throughout the execution of the fraudulent scheme and that § 2314, par. 2, refers to "interstate commerce" rather than to "interstate or foreign commerce" as is the case in the rest of the section, Federal jurisdiction was established by the fact of the victim's interstate travel which was an integral part of the scheme. The court said:

It is a well-established principle that "Acts done outside a jurisdiction, but intended to produce and producing detrimental effects within it, justify a state in punishing the cause of the harm as if he had been present at the effect. . . . *Strassheim v. Daily*, 221 U.S. 280, 285, 31 S.Ct. 558, 560, 55 L.Ed. 735 (1911). See also *United States v. Braverman*, 376 F.2d 249 (2nd Cir. 1967); *United States v. Steinberg*, 62 F.2d 77 (2nd Cir. 1932). The appellant knew that his victim would have to travel in interstate commerce if his scheme were to succeed. It follows that the government correctly proved a violation

<sup>1</sup> Sec. 2314, par. 2, provides: "Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transports or causes to be transported, or induces any person to travel in, or to be transported in interstate commerce in the execution or concealment of a scheme or artifice to defraud that person of money or property having a value of \$5,000 or more; . . .

"Shall be fined not more than \$10,000 or imprisoned not more than ten years, or both." (Footnotes by court omitted.)

<sup>2</sup> 412 F.2d 657 at 658.

of the paragraph of section 2314 of which the appellant was charged and convicted.<sup>3</sup>

Appellant also contended that the Federal authorities had acquired personal jurisdiction over him illegally. He argued that in 1968 he had traveled from Toronto to Mexico City *via* Detroit and that Mexican authorities, at the instance of United States authorities, refused to let him land, so that he was obliged immediately to retrace this journey. When his aircraft landed in Detroit, he was induced by Federal authorities to leave the aircraft; he was arrested and later brought to the State of Washington for trial. Judge Hamlin said:

Any contention that this procedure offended constitutional guarantees is foreclosed by the Supreme Court decision in *Frisbie v. Collins*, 342 U.S. 519, 72 S.Ct. 509, 96 L.Ed. 541 (1952). The Court there stated, "This Court has never departed from the rule announced in *Ker v. Illinois*, 119 U.S. 436, 444, 7 S.Ct. 225, 30 L.Ed. 421, that the power of a court to try a person for crime is not impaired by the fact that he had been brought within the court's jurisdiction by reason of a 'forcible abduction'." 342 U.S. at 522, 72 S.Ct. at 571. Indeed, the facts in the instant case show that far less force was used to apprehend the appellant than was used in *Collins*. This court has consistently adhered to the principles of *Ker* and *Collins*. *Hunt v. Eyman*, 9 Cir., 405 F.2d 384, Dec. 27, 1968; *Tynan v. Eyman*, 371 F.2d 764 (9th Cir. 1967). The appellant was properly brought before the district court for trial.<sup>4</sup>

*Jurisdiction—Outer Continental Shelf—extraterritorial effect of Louisiana statute upon collision between foreign vessels and drilling platform on Outer Continental Shelf—Convention on Continental Shelf, 1958*

CONTINENTAL OIL COMPANY v. LONDON STEAM-SHIP OWNERS' MUTUAL INSURANCE ASSOCIATION, LTD. 417 F.2d 1030.

U.S. Court of Appeals, 5th Cir., September 23, 1969.

The S.S. *Kimon*, a vessel owned by a Liberian corporation and manned by a Greek crew, collided with an oil drilling and production platform located upon the Outer Continental Shelf in the Gulf of Mexico some fifty miles off the coast of Louisiana. The platform owner filed suit for damages against the shipowner's underwriter, a British firm, invoking the Louisiana Direct Action Statute.<sup>1</sup> It was contended on behalf of the platform owner

<sup>3</sup> *Ibid.* 659.

<sup>4</sup> *Ibid.* 659-660.

<sup>1</sup> The statute provides: "No policy or contract of liability insurance shall be issued or delivered in this state, unless it contains provisions to the effect that the insolvency or bankruptcy of the insured shall not release the insurer from the payment of damages for injuries sustained or loss occasioned during the existence of the policy, and any judgment which may be rendered against the insured for which the insurer is liable which shall have become executory, shall be deemed prima facie evidence of the insolvency of the insured, and an action may thereafter be maintained within the terms and limits of the policy by the injured person, or his or her survivors mentioned in Revised Civil Code Article 2315, or heirs against the insurer. The injured person or his or her survivors or heirs hereinabove referred to, at their option, shall have a right of direct action against the insurer within the terms and limits of the policy; and

that the Louisiana statute, which permits a party injured in the State to sue a liability insurer directly rather than first proceeding against the assured,<sup>2</sup> was applicable in the instant case as Federal law within the terms of the Outer Continental Shelf Lands Act.<sup>3</sup> The District Court dismissed the action on grounds that by Louisiana decisional law the Direct Action Statute could not have extraterritorial effect. The Court of Appeals af-

---

such action may be brought against the insurer alone, or against both the insured and insurer jointly and in solido, in the parish in which the accident or injury occurred or in the parish in which an action could be brought against either the insured or the insurer under the general rules of venue prescribed by Art. 42, Code of Civil Procedure. This right of direct action shall exist whether the policy of insurance sued upon was written or delivered in the State of Louisiana or not and whether or not such policy contains a provision forbidding such direct action, provided the accident or injury occurred within the State of Louisiana. Nothing contained in this Section shall be construed to affect the provisions of the policy or contract if the same are not in violation of the laws of this State. It is the intent of this Section that any action brought hereunder shall be subject to all of the lawful conditions of the policy or contract and the defenses which could be urged by the insurer to a direct action brought by the insured, provided the terms and conditions of such policy or contract are not in violation of the laws of this State.

"It is also the intent of this Section that all liability policies within their terms and limits are executed for the benefit of all injured persons, his or her survivors or heirs, to whom the insured is liable; and that it is the purpose of all liability policies to give protection and coverage to all insureds, whether they are named insured or additional insureds under the omnibus clause, for any legal liability said insured may have as or for a tortfeasor within the terms and limits of said policy." LRS 22:655. (Footnote by court; footnotes renumbered or omitted.) 417 F.2d 1030 at 1031-1032.

<sup>2</sup> The platform owner filed a libel *in rem* against S/S *Kimón* in the Federal District Court in Texas and presumably obtained security under the traditional stipulation (bond) to release the vessel from seizure. Shipowner filed a petition for limitation of liability. 46 U.S.C.A. § 181 et seq., Adm.R.F. (4), in which the platform owner filed a claim and Shipowner filed a cross claim against the platform owner under the *Duke of York, British Transport Comm'n. v. United States*, 1957, 354 U.S. 129, 77 S.Ct. 1103, 1 L.Ed.2d 1234, 1957 A.M.C. 1151. (Footnote by court.) *Ibid.* 1033.

<sup>3</sup> The Act provides: "To the extent that they are applicable and not inconsistent with this subchapter or with other Federal laws and regulations of the Secretary now in effect or hereafter adopted, the civil and criminal laws of each adjacent state as of [the effective date of this subchapter] are declared to be the law of the United States for that portion of the subsoil and seabed of the outer Continental Shelf, and artificial islands and fixed structures erected thereon, which would be within the area of the State if its boundaries were extended seaward to the outer margin of the outer Continental Shelf, and the President shall determine and publish in the Federal Register such projected lines extending seaward and defining each such area. All of such applicable laws shall be administered and enforced by the appropriate officers and courts of the United States. State taxation laws shall not apply to the outer Continental Shelf.

"The provisions of this section for adoption of State law as the law of the United States shall never be interpreted as a basis for claiming any interest in or jurisdiction on behalf of any State for any purpose over the seabed and subsoil of the outer Continental Shelf, or the property and natural resources thereof or the revenues therefrom." 43 U.S.C.A. § 1333(a)(2)(3). (Footnote by court.) *Ibid.* 1034.

firmed, holding that the Direct Action Statute was not applicable as Federal law where admiralty remedies were available.

Chief Judge Brown said:

The platform owner contends that the term "applicable" as used in the Outer Continental Shelf Lands Act "can only mean applicable to the subject matter in question." And, the argument continues, since this is a suit involving a policy of liability insurance, the Direct Action Statute by its terms covers that very situation. Thus the Direct Action Statute is "applicable" within the meaning of the Act, and being "applicable" affords its own direct relief.

On such reading the necessity for state law (in the sense of a right being lost in its absence) is not the significant factor. State law becomes merely a matter of affording some gain or benefit or advantage not available if state law can not be invoked. Such a reading, of course, puts almost 100% emphasis on the "not inconsistent . . . with federal laws" element of § 1333(a)(2)—a problem which the platform owners circumnavigate by not only moving the Louisiana law out to sea but moving the occurrence back into Louisiana as though it had taken place on inland waters. That is a lot of fictionalizing. And in more austere words it imputes to Congress the purpose generally to export the whole body of adjacent law onto the Outer Continental Shelf for automatic application to any and all occurrences *unless*—with the *unless* being limited to (a) specific provisions within the Act or (b) inconsistent federal law. By whatever characterization expressed, in determining what law is to govern, that approach accords initially a superiority to adjacent state law—the question of federal law comes into play only after this process excludes state law. This is hardly in keeping with the course of legislative history in which the notion of supremacy of state law administered by state agencies was expressly rejected.<sup>4</sup>

The court said further that

. . . in assaying congressional purpose the focus must be on National and International interests.

This brings into play both physical and legal factors. For these waters not only are legally "high seas", . . . they are in fact "high seas." This means that these structures may be, and often are, far from the adjacent shore in the very track of merchantmen of all flags and of all nations plying recognized sea lanes of the Atlantic, Pacific and Gulf of Mexico.

The major part of this traffic will have no concern with the particular adjacent state within whose artificial extended boundaries the structure happens to be. . . .

In the midst of all this traffic to which the Outer Continental Shelf Lands Act and International Convention [Convention on the Continental Shelf, 1958]<sup>5</sup> . . . assure full, traditional freedom of the seas, it is unthinking that Congress ever remotely considered—even for the briefest moment—that by the rare coincidence of hitting a structure located 50 miles off shore Louisiana a local, non-maritime Louisiana statute could leap this distance to subject a foreign vessel owner and

<sup>4</sup> *Ibid.* 1035-1036 (emphasis by court).

<sup>5</sup> 15 U.S. Treaties and Other International Agreements 471; 499 U.N. Treaty Series 311; 52 A.J.I.L. 858 (1958).

her foreign, but amenable, underwriters to a suit in a Louisiana Federal Court even though the vessel never had been and never would trade to and from Louisiana ports. If that is so, then it would be equally unthinking to suppose that Congress meant to import an exception by allowing adoption where, by a further rare coincidence, the foreign vessel, otherwise free to sail as she pleases, happens to hit the structure while bound to or from a Louisiana port. Any such "exception" would itself disrupt the basic underlying policy of non-interference with navigation on the high seas by making it necessary for underwriter or owner, or both, to first submit to the Louisiana Direct Action suit and then in it establish the right to the "exception."

These considerations become more significant in the light of today's multiparty donnybrooks, see *Grigsby v. Coastal Marine Service*, 5 Cir., 1969, 412 F.2d 1011, A.M.C. in which theories of initial, contingent and secondary liabilities orbit to an imaginative apocenter. Without physically touching the offshore structure to trigger the Extension of Admiralty Act<sup>6</sup> . . . it is quite conceivable that the conduct of the foreign vessel might be found to have brought about damage to the structure caused physically by some other craft under circumstances in which the law would conclude that in legal effect it was the foreign vessel that "hit" the structure. Thus by a series of fictions and legal theories a foreign underwriter or owner, or both, find the freedom of the seas disrupted by a statute of a state not then visible and to which neither ever intended to go.<sup>7</sup>

The court pointed out that the United States Supreme Court in *Rodrigue v. Aetna Casualty & Surety Co.*, an action involving the application of the same Louisiana statute, made it quite clear that, under the Outer Continental Shelf Lands Act, State law was to be used only to supply *lacunae* in the Federal law, not to supplant it.<sup>8</sup>

*Confiscation of private property—Czechoslovakia—effective date of loss for purposes of income tax deductions—Foreign Claims Settlement Commission*

ESTATE OF FUCHS v. COMMISSIONER OF INTERNAL REVENUE. 413 F.2d 503.

U.S. Court of Appeals, 2d Cir., June 27, 1969.

Petitioner, appearing individually and as executrix for her husband's estate, appealed from a decision of the Tax Court of the United States<sup>1</sup> holding that under Section 165 of the Internal Revenue Code of 1954<sup>2</sup> and

<sup>6</sup> Extension of Admiralty Jurisdiction Act, 46 U.S.C.A. § 740 (cited by court), 417 F.2d 1030 at 1033.

<sup>7</sup> *Ibid.* 1038-1040.

<sup>8</sup> 395 U.S. 352 at 357 (1969) (cited by court), *ibid.* 1036.

<sup>1</sup> 27 CCH Tax Ct. Mem. 916 (1968) (cited by court), 413 F.2d 503 at 505.

<sup>2</sup> Sec. 165. *Losses*.

(a) General Rule.—There shall be allowed as a deduction any loss sustained during the taxable year and not compensated for by insurance or otherwise. . . .

(c) Limitation on Losses of Individuals.—In the case of an individual, the deduction under subsection (a) shall be limited to—

(1) losses incurred in a trade or business; . . .



Section 1.165-1 (d) of the Regulations<sup>3</sup> she should have taken a loss due to the nationalization of her property in Czechoslovakia in her 1953 joint income tax return rather than in the returns filed for the years 1959 through 1962. Petitioner had inherited one apartment building and half interest in a second apartment building in Brno, Czechoslovakia, in 1947. In 1953 the Czech Government nationalized the building in which she had half interest. She apparently retained title to the building which she wholly owned until 1959, when it was nationalized, but she received no income from this building after the beginning of 1953 when the Czech Government issued a law requiring that the rent from buildings grossing an annual income of 15,000 crowns or more, as in the case of both of petitioner's buildings, should be paid into special accounts from which inheritance taxes, if any, property taxes, and costs of building repairs would be defrayed.

In 1959 petitioner filed a claim<sup>4</sup> with the Foreign Claims Settlement Commission for recovery of \$55,000 on the building in which she had half interest and \$20,000 on the second one. The Commission established that the confiscation was effective on January 1, 1953, when the special accounts law became effective and allowed her the sums of \$47,300 and \$11,000, respectively, on the two buildings. As the total funds available for awards in claims against Czechoslovakia were limited, the Commission gave her a *pro rata* payment of \$5,312.74 for the two buildings. In 1962 petitioner deducted \$77,000.73 as a loss for the confiscation of the two buildings and applied the unused portion of this sum against the income reported in the joint tax returns for 1959, 1960, and 1961. The Commission of Internal Revenue disallowed this deduction on grounds that the loss had occurred in 1953; the Tax Court sustained this holding. Petitioner argued, however, that as the effective nationalization of the house which she wholly owned did not take place until 1959, there was always a possibility that she might be reimbursed for rents or value between 1953 and 1959, hence that she was entitled to take the loss in the tax returns for 1959-1962, during which time her claim was before the Foreign Claims Settlement Commis-

---

(3) losses of property not connected with a trade or business, if such losses arise from fire, storm, shipwreck, or other casualty, or from theft.

(Quoted by court), *ibid.* 506.

<sup>3</sup> Regulation 1.165-1(d) provides in part:

(2)(i) If a casualty or other event occurs which may result in a loss and, in the year of such casualty or event, there exists a claim for reimbursement with respect to which there is a reasonable prospect of recovery, no portion of the loss with respect to which reimbursement may be received is sustained, for purposes of section 165, until it can be ascertained with reasonable certainty whether or not such reimbursement will be received. Whether a reasonable prospect of recovery exists with respect to a claim for reimbursement of a loss is a question of fact to be determined upon an examination of all facts and circumstances.

(Quoted by court), *ibid.* 507.

<sup>4</sup> The International Claims Settlement Act of 1949 was amended in 1958 to provide for claims against Czechoslovakia. 22 U.S.C. §§ 1642-1642(p). (Noted by court), *ibid.* 505.

sion. She admitted to the Commission that to all intents and purposes the wholly-owned house had been confiscated since 1948 as she had exercised no control over it after that date, hence that the prospect of obtaining any revenue from it up to 1959 was entirely theoretical. The Court of Appeals affirmed the decision of the Tax Court.

Circuit Judge Feinberg agreed with the Tax Court that a realistic appraisal of the situation indicated that petitioner had lost all control over her property in 1953 and that she had little reason in 1953 for optimism as to later reimbursement. Following the rule of *United States v. S. S. White Dental Mfg. Co.*,<sup>5</sup> as interpreted by the Tax Court in 1967,<sup>6</sup> Judge Feinberg held that the tax deduction for loss by confiscation should be taken in the year in which the confiscation occurred. The court said:

We think that this interpretation of the regulation is correct and controls the present litigation. At the time of the effective confiscation of petitioner's property in 1953 there was no likelihood of recovery from the government of Czechoslovakia and no more than a possibility that some reimbursement would be effectuated by the United States Government. That petitioner's subjective faith in the eventual vindication of her rights by her Government may have been great is not sufficient. See *Boehm v. Commissioner of Internal Revenue*, 326 U.S. 287, 292-293, 66 S.Ct. 120, 90 L.Ed. 78 (1945). Nor is the fact that in 1962, nearly ten years after the seizure, she did receive a partial compensation award from the United States significant in evaluating her "claim for reimbursement" as of 1953. See *White Dental, supra*; *Schweitzer v. Commissioner of Internal Revenue*, 376 F.2d 30 (3d Cir.), cert. denied, 389 U.S. 971, 88 S.Ct. 467, 19 L.Ed.2d 462 (1967); *Estate of Scofield v. Commissioner of Internal Revenue*, 266 F.2d 154, 163 (6th Cir. 1959). But cf. *Reiner v. United States*, 222 F.2d 770 (7th Cir. 1955). In 1953 the prospect of recovery on that claim was far too "nebulous and problematical," *Scofield, supra*, 266 F.2d at 159, to satisfy the requirement of the regulation. While we are not without sympathy for the difficulties of petitioner's situation,<sup>7</sup> we can only repeat the advice this court offered many years ago in *Young v. Commissioner of Internal Revenue*, 123 F.2d 597, 600 (2d Cir. 1941): "In cases like this the taxpayer is at times in a very difficult position in determining in what year to claim a loss. The only safe practice, we think, is to claim a loss for the earliest year when it may possibly be allowed and to renew the claim in subsequent years if there is any reasonable chance of its being applicable to the income for those years."<sup>8</sup>

*Inheritance by non-resident alien—State statutory requirement of reciprocal rights in control of inheritances—the law of California—Treaty of Friendship, Commerce, and Consular Rights with Ger-*

<sup>5</sup> 274 U.S. 398, 47 S.Ct. 598, 71 L.Ed. 1120 (1927) (cited by court), *ibid.* 507.

<sup>6</sup> Harry J. Colish, 48 T.C. 711 (1967) (cited by court), *ibid.* 508.

<sup>7</sup> Congress, too, apparently sympathizes with the problems of those whose foreign property is expropriated and has provided that some expropriation losses sustained after 1958 may be carried over for ten years after the loss is incurred. See Int. Rev. Code of 1954, § 172 (b)(1)(D). (Footnote by court), *ibid.*

<sup>8</sup> *Ibid.*

*many, 1923—application of treaty to East Germany—Federal control of foreign relations of United States—disposition of personality to German heirs governed by State law*

IN RE ESTATE OF KRAEMER. 81 Cal. Rptr. 287.

Court of Appeals, California, 2d Dist., Div. 5, October 9, 1969.

Petitioner, a citizen and resident of East Germany, claimed the right of succession to the estate, consisting of real and personal property, of her son, a naturalized United States citizen who was a resident of California at the time of his death. The State of California contended that she could not claim this right because it could not be shown that East Germany accords reciprocal rights of succession to real and personal property to American heirs of East German nationals, as required by Section 259<sup>1</sup> of the Probate Code; consequently, according to Section 259.2 of this Code the estate escheated to the State. Petitioner argued that Section 259 was invalid because it conflicts with the provisions of Article IV of the Treaty of Friendship, Commerce, and Consular Rights with Germany of 1923,<sup>2</sup> and it constituted an intrusion by the State into the Federal domain of foreign

<sup>1</sup> Section 259 provides: "The right of aliens not residing within the United States or its territories to take real property in this State by succession or testamentary disposition, upon the same terms and conditions as residents and citizens of the United States is dependent in each case upon the existence of a reciprocal right upon the part of citizens of the United States to take real property upon the same terms and conditions as residents and citizens of the respective countries of which such aliens are residents and the right of aliens not residing in the United States or its territories to take personal property in this State by succession or testamentary disposition, upon the same terms and conditions as residents and citizens of the United States, is dependent in each case upon the existence of a reciprocal right upon the part of citizens of the United States to take personal property upon the same terms and conditions as residents and citizens of the respective countries of which such aliens are residents." (Footnote by court; some footnotes renumbered, others omitted.) 81 Cal. Rptr. 287 at 288-289.

<sup>2</sup> 44 Stat. 2132; 52 League of Nations Treaty Series 133. Article IV provides: "Where, on the death of any person holding real or other immovable property or interests therein within the territories of One High Contracting Party, such property or interests therein would, by the laws of the country or by a testamentary disposition, descend or pass to a national of the other High Contracting Party, whether resident or nonresident, were he not disqualified by the laws of the country where such property or interests therein is or are situated, such national shall be allowed a term of three years in which to sell the same, this term to be reasonably prolonged if circumstances render it necessary, and withdraw the proceeds thereof, without restraint or interference, and exempt from any succession, probate or administrative duties or charges other than those which may be imposed in like cases upon the national of the country from which such proceeds may be drawn.

"Nationals of either High Contracting Party may have full power to dispose of their personal property of every kind within the territories of the other, by testament, donation, or otherwise, and their heirs, legatees and donees, of whatsoever nationality, whether resident or nonresident, shall succeed to such personal property, and may take possession thereof, either by themselves or by others acting for them, and retain or dispose of the same at their pleasure subject to the payment of such duties or charges only as the nationals of the High Contracting Party within whose territories such property may be or belong shall be liable to pay in like cases." (Footnote by court.) *Ibid.* 289.

relations. The Superior Court found for petitioner. On appeal, the Court of Appeals affirmed this judgment.

Associate Justice Chantry adopted much of the opinion of Superior Court Judge Call. In his opinion, Judge Call examined *Clark v. Allen*<sup>3</sup> as to the rights of inheritance of realty and personalty secured by the 1923 Treaty, and *Zschernig v. Miller*,<sup>4</sup> in which the United States Supreme Court held that the Oregon statute concerning inheritance of property in that State by aliens residing abroad constituted an intrusion into the Federal field of foreign relations. The Court of Appeals quoted Judge Call as follows:

And consequently, under the same rationale [*i.e. Zschernig v. Miller*], section 259 of the Probate Code of the State of California, which is substantially a restatement of subdivision 1 of the Oregon Revised Statute, must also fall, and for the same reason.

It was held in *Clark v. Allen* that the rights secured by the 1923 Treaty, as to *realty*, were in terms of a right to sell within a specified time, with a right to withdraw the proceeds . . . and that these rights extend to German heirs of "any person" holding realty in the United States, regardless of citizenship, . . . and the disposition of *realty* is governed by the treaty, and its provisions prevail over any conflicting provision of California law. It was further held that as to *personalty*, that the treaty refers only to the rights of nationals of either country to dispose of their personal property in the other country, and that it does not cover *personalty located in the United States* which a United States citizen undertakes to leave to German Nationals. (Emphasis added.)

It follows that the right of alien heirs under the Treaty,—“Nationals of either High Contracting Party” . . . to dispose of—“their personal property of every kind within the territories of the other,”—“. . . does not cover personalty located in *this country* and which an American citizen-national undertakes to leave to German nationals.” On the other hand, if the decedent is a citizen-national (or noncitizen-national) of the United States of America, and the personalty is located in this country, the question of its inheritance or succession then, are determined by local or State law, *Lyeth v. Hoey*, 305 U.S. 188 [59 S.Ct. 155, 83 L.Ed. 119]; and *Irving Trust Company v. Day*, 135 U.S. 556 [314 U.S. 556, 62 S.Ct. 398, 86 L.Ed. 452]; *People [ex rel. Attorney General] v. Roach*, 76 Cal. 294 [18 P. 407].

Where these rights may be affected by an overriding federal policy, as where the Treaty makes different or conflicting arrangements, the State law must give way. But, as in this case, where there is no treaty governing the rights to succession to the personal property the disposition or the right of succession is governed by the laws of the State of California.

Section 671 of the Civil Code respecting the taking hold, or disposing of real or personal property provides as follows:

“Who May Own Property. Any person, whether citizen or alien, may take, hold and dispose of property real or personal, within this state.

“Section 225 of the Probate Code respecting succession provides in part as follows:

<sup>3</sup> 331 U.S. 503 (1947); 42 A.J.I.L. 201 (1948).

<sup>4</sup> 389 U.S. 429 (1968); 62 A.J.I.L. 971 (1968).

"No Surviving Spouse Nor Issue. If the decedent leaves neither issue nor spouse, the estate goes to his parents in equal shares, or if either is dead to the survivor. . . .

"Section 1026 of the Probate Code respecting the succession by a nonresident alien to property in California provides as follows:

"Alien Succeeding To Property. A nonresident alien who becomes entitled to property by succession must appear and demand the property within five years from the time of succession; otherwise, his rights are barred and the property shall be disposed of as escheated property."

From these sections it is clear that Ida Kraemer, the mother of decedent and Petitioner for Determination of Heirship, is entitled to full distribution of the within estate of Harry Kurt Kraemer, and that the State of California is entitled to no right or title therein or distribution thereof.<sup>5</sup>

Justices Stephens and Reppy concurred.

*Aliens—recovery by alien seaman for injuries sustained in United States port aboard Greek flag vessel owned and operated by Greek corporation—conditions of domicile of foreign corporations in United States—flags of convenience*

HELLENIC LINES LIMITED v. RHODITIS. 412 F.2d 919.

U.S. Court of Appeals, 5th Cir., May 8, 1969. Rehearing denied and rehearing *en banc* denied, July 3, 1969.

Plaintiff, a seaman of Greek nationality, sought to recover compensation for an injury sustained while serving aboard the *Hellenic Hero*, a ship of Greek registry, when it was docked in New Orleans. The ship is owned by Universal Cargo Carriers, a Panamanian corporation, which serves as a holding company for Hellenic Lines, Ltd., a Greek corporation ninety-five percent of the stock of which is owned by two Greek nationals, one of whom has resided in the United States since 1945. The principal office of Hellenic Lines is in New York; it maintains another office in New Orleans. The ship has been engaged in carrying cargo to and from the United States. The plaintiff had originally brought a libel *in rem* against the ship and *in personam* against the owners; however, on finding that the defendants had substantial ties to the United States, he substituted a suit *in personam* against the owners under the Jones Act.<sup>1</sup> The defendants moved

<sup>5</sup> 81 Cal. Repr. 287 at 294-295. (Emphases by court; bracketed citations by reporter.)

<sup>1</sup> 46 U.S.C.A. § 688 (1958). The Act provides: "Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located." (Quoted by court.) 412 F.2d 919 at 920. (Other footnotes by court omitted.)

for dismissal on grounds that the District Court lacked jurisdiction over the subject matter. The District Court, invoking *Lauritzen v. Larsen*,<sup>2</sup> found for plaintiff and awarded him damages of \$6,000. The owners appealed on the issue of the trial court's jurisdiction. The Court of Appeals affirmed the judgment below.

At the outset, Judge Goldberg noted that in *Lauritzen* the Supreme Court had established seven factors which should be taken into account when the application of the Jones Act to a particular situation is under consideration:

(1) the place of the wrongful act; (2) the law of the flag; (3) the allegiance or domicile of the injured seaman; (4) allegiance of the defendant shipowner; (5) the place where the contract of employment was made; (6) the inaccessibility of a foreign forum; and (7) the law of the forum.<sup>3</sup>

Of these several factors, the Supreme Court attached great significance to the law of the flag, saying:

[T]he weight given to the ensign overbears most other connecting events in determining applicable law, . . . it must prevail *unless some heavy counterweight appears*.<sup>4</sup>

Pursuing this argument in the *Rhoditis* case, Judge Goldberg stated:

In this case we find that heavy counterweight: the HELLENIC HERO was for all commercial purposes owned and operated by a United States domiciliary.

The HERO's flag is more symbolic than real as is evidenced by the fact that its operation and ownership ties are American, not Greek. Under these circumstances it is fair to say that the HERO's flag is not due the same weight which *Lauritzen* gave to a more sturdy flag. Courts need not elevate symbols over reality. We therefore pierce the corporate veil and conclude that the HERO's flag is merely one of convenience.<sup>5</sup>

The court continued:

Most of the flag of convenience cases have involved ships whose owners were American citizens, not aliens domiciled in the United States as here. This distinction should make no difference because aliens residing in this country are, with rare exception, subject to the same commercial and tort laws as United States citizens. . . .

The American character of this tort is further emphasized by the fact that Zacharias [*Rhoditis*]' injury occurred in the Port of New Orleans. This alone would not be sufficient to invoke the Jones Act. *Romero v. International Terminal Operating Co.*, 1959, 358 U.S. 354, 381-384, 79 S.Ct. 468, 3 L.Ed. 2d 368, 387-389. It is, however, a countervailing factor which weakens our bondage to the flag. When combined with the totality of American contacts, the fact that the accident occurred in our territorial waters points to Jones Act applicability.<sup>6</sup>

<sup>2</sup> 345 U.S. 571, 73 S.Ct. 921, 97 L.Ed. 1254 (1953); 47 A.J.I.L. 711 (1953).

<sup>3</sup> 412 F.2d 919 at 922.

<sup>4</sup> 345 U.S. 571 at 584-586, 73 S.Ct. 921 at 930, 97 L.Ed. 1254 at 1269. (Quoted and cited by court; emphasis by court.) *Ibid.* 923.

<sup>5</sup> *Ibid.*

<sup>6</sup> *Ibid.* 924-925.

The court pointed out that the Court of Appeals for the Second Circuit had reached a contrary conclusion on identical facts in *Tsakonites v. Transpacific Carriers Corp.*<sup>7</sup> Judge Goldberg refused, however, to accept the reasoning of the majority in that case, preferring the "persuasive logic" of Judge Waterman, dissenting, who said, in part:

I repeat: Shipowners who are resident aliens and shipowners who are United States citizens should be subject to the same liabilities for injuries suffered by their employees on their vessels when the vessels are at United States piers. If a United States shipowner is liable under the Jones Act to a foreign seaman serving on a foreign-registered vessel injured in our territorial waters, a permanently resident alien should also be so liable. 368 F.2d at 429-430.<sup>8</sup>

*Sovereign immunity—United Nations—order of sequestration of salary and allowances paid to non-resident United Nations employee—the law of New York*

MEANS v. MEANS. 303 N.Y.S. 2d 424.

Family Court, City of New York, New York County, August 6, 1969.

Petitioner, acting on behalf of herself and her minor child, sought an order of sequestration of salary and allowances being paid by the United Nations Secretariat to her husband, a telecommunications operator said to be stationed in Korea. There was some question as to whether petitioner was still the wife of the respondent, as he had allegedly obtained a Turkish divorce but without personal jurisdiction being exercised over petitioner. For her part, petitioner argued that she and her child were entitled to more support than the \$44 per month remitted to her by the United Nations pursuant to the purported Turkish divorce decree. She asked the court to order sequestration of respondent's funds, although the court did not have jurisdiction *in personam* over respondent nor *in rem* over his property,<sup>1</sup> in order to have a basis on which to request the Department of State to urge the United Nations to increase the remittance. She also sought a judgment for arrears arising from an order for temporary support granted by the Supreme Court, New York County, in a separation suit which she had brought against respondent. The Family Court held that the order of support should be temporary and that funds of respondent, other than those emanating from the United Nations, should be impounded until he had had an opportunity to be heard with regard to the extent of petitioner's claims for support. The court denied without prejudice petitioner's application for a judgment in arrears.

<sup>7</sup> 368 F.2d 426 (2nd Cir., 1966); cert. denied, 386 U.S. 1007, 87 S.Ct. 1348, 18 L.Ed.2d 434. (Cited by court), 412 F.2d 919 at 925.

<sup>8</sup> *Ibid.* 926. (Quoted by court.)

<sup>1</sup> Section 429, New York Family Court Act (cited by court). 303 N.Y.S. 2d 424 at 426.

Judge Midonick said with regard to the issue of sequestration of funds received by respondent from the United Nations:

There is expressly excluded for the time being from any sequestration order, any monies whether wages, salary, maintenance allotment, overseas allowance or other, payable or to become payable from the funds of the United Nations Secretariat to the respondent who appears to be employed by such United Nations Secretariat. This exclusion is based upon the sovereign immunity of the United Nations as such and will continue unless and until expressly modified by order of a judge of this Court, in accordance with the doctrines applicable, including that in *Matter of United States of Mexico v. Schmuck*, 294 N.Y. 265, 62 N.E. 2d 64. The only basis upon which such modification can be made is if and when and to the extent it is proved to the satisfaction of this Court that the United Nations consents to such sequestration either by direct advice from a representative of the United Nations or by advice thereof from the Department of State of the United States.<sup>2</sup>

*Warsaw Convention—limitation of carrier's liability for luggage loss—adequacy of notice to passenger of limitation of liability under terms of Convention*

PARKER v. PAN AMERICAN WORLD AIRWAYS, INC. 447 S.W. 2d 731.  
Court of Civil Appeals, Texas, Nov. 7, 1969; rehearing denied, Dec. 5, 1969.

Plaintiffs brought an action against Pan American World Airways, Inc., to recover damages for the loss of Mrs. Parker's luggage allegedly due to the carrier's negligence. It was agreed by both parties that the flight on which Mrs. Parker returned from Antigua, B.W.I., to the United States was diverted by reason of bad weather from New York to Washington and that the carrier arranged to transport passengers and luggage to New York by bus. Mrs. Parker's suitcase was seen by her in Washington but not thereafter. A jury returned a verdict finding the carrier negligent in handling the luggage and that such negligence was the proximate cause of plaintiffs' loss. The jury awarded damages of \$2,627. Both parties filed motions for judgment on the verdict, and the defendant filed a motion in the alternative for a judgment *non obstante veredicto*, asking the court to limit the amount recoverable by plaintiffs to \$331.60, the maximum allowable under the provisions for limitation of carrier's liability respecting loss of luggage contained in the Warsaw Convention.<sup>1</sup> The trial court rendered judgment to plaintiffs for \$331.60. The Court of Civil Appeals affirmed this judgment.

Appellants contended, first, that the trial court should not have disregarded the jury's verdict as there was probative evidence to support this finding. Chief Justice Dixon pointed out that the trial court had neither rendered a judgment *non obstante veredicto* nor disregarded the jury's finding on the amount of damages. The trial court had, instead, rendered

<sup>2</sup> *Ibid.* 427.

<sup>1</sup> 49 Stat. 3000; 137 League of Nations Treaty Series 11. (Footnotes by court omitted.)



a judgment based upon the verdict but had adjusted the amount recoverable to the maximum provided by the Warsaw Convention,<sup>2</sup> whereas the jury had disregarded this legal maximum. The court pointed out that: "The Warsaw Convention is the law of the land with respect to international air transportation and courts may not ignore its provisions."<sup>3</sup> It was further noted that the Supreme Court of Texas had said with regard to a similar situation: "In order to conform to the verdict it is not necessary that the judgment be for the same amount of damages as assessed by the jury."<sup>4</sup>

Appellants also argued that the provisions of the Convention concerning the limitations of carrier's liability which were reproduced on the ticket did not govern in this case because they were printed in such small type as not to constitute adequate notice to the ticket holder. This contention rested upon similar holdings in *Egan v. American Airlines*<sup>5</sup> and *Lisi v. Alitalia-Linee Aeree Italiane, S.p.A.*<sup>6</sup> Chief Justice Dixon held that *Egan* and *Lisi* did not control in this case for the following reasons:

1. The printing on the back of the ticket and baggage check in this case, though small, is certainly readable. The three members of this court experienced no difficulty in reading it. We cannot say that as a matter of law the printed matter in question is in such small type as to be concealed, unnoticeable, unreadable, invisible, or that it cannot reasonably be deciphered.

2. Above the body of the printed provisions in large type is the caption or designation of the printed matter below. This designation is printed in capital letters sufficiently large to be easily readable. It is as follows: "CONDITIONS OF CONTRACT". This caption or designation could not be unreadable or unnoticed by anyone able to read or to take notice who would bother to look.

3. It is true that the carrier is required under the terms of the Warsaw Convention to print on the baggage ticket notice of the limitation of liability as to loss of baggage. In this case the carrier complied with this requirement.<sup>7</sup>

<sup>2</sup> Pertinent provisions of the Convention are as follows: "2(a) Carriage hereunder is subject to the rules and limitations relating to liability established by the Convention for the Unification of Certain Rules relating to International Carriage by Air, signed at Warsaw October 12, 1929 (hereinafter called 'the Convention'), . . . 2(c) Unless expressly so provided, nothing herein contained shall waive any limitation of liability of carrier existing under the Convention or applicable laws. . . . 4(d) Any liability of carrier is limited to 250 French gold francs (consisting of 65½ milligrams of gold with a fineness of nine hundred thousandths) or its equivalent per Kilogram in the case of checked baggage, . . . unless a higher value is declared in advance and all charges are paid pursuant to carrier's tariffs. . . ." (Quoted by court.) 447 S.W. 2d 731 at 732-733.

<sup>3</sup> *Ibid.* 734.

<sup>4</sup> *Ibid.* 733. Citing *Williams v. Wyrick*, 151 Tex. 40, 245 S.W.2d 961 (1952) (emphasis by Court of Civil Appeals).

<sup>5</sup> *Egan v. Kollsman Instrument Corp.*, 237 N.Y.S. 2d 14 (Ct. App. N.Y., 1967), cert. denied, 390 U.S. 1039 (1968); 62 A.J.I.L. 985 (1968).

<sup>6</sup> 370 F.2d 508 (2d Cir., 1966), affirmed by equally divided court, 390 U.S. 455 (1968), rehearing denied, 391 U.S. 929 (1969); 61 A.J.I.L. 812 (1967).

<sup>7</sup> 447 S.W. 2d 731 at 735.

It was further contended on behalf of appellants that the luggage was lost after the conclusion of the international flight rather than in the course of such flight, so that the Convention's terms would not be applicable to such loss. The court pointed out, however, that Mrs. Parker's round trip flight commenced and ended in New York and that the carrier had fulfilled its responsibility under the terms of the ticket by transporting her to New York from Washington by bus, so that the international flight could not be said to have terminated in Washington. Nor was there any evidence to show whether the luggage had disappeared in Washington or *en route* to New York.

#### REPUBLIC OF CHINA CASE NOTE

*Jurisdiction—offense committed aboard flag-state's vessel in foreign port  
—desertion from merchant vessel abroad—law of Republic of China*

PUBLIC PROCURATOR *v.* HO CH'IH-NUNG. Wu-ch'i-nien [1968] i tzu No. 8672.

District Court of Taipei, Taiwan, August 22, 1968.\*

Defendant, a seaman serving on the S.S. *Hsiang-yün*, a vessel operated by the China Navigation Co., Ltd., sailed on August 26, 1965, from Keelung, Republic of China, to Baltimore. Upon his arrival at Baltimore on October 10, he left the vessel without permission and did not return. He was subsequently arrested by United States immigration authorities and deported to the Republic of China. The District Court of Taipei sentenced him to three months' imprisonment on a charge of violating the order issued under Article 11 of the National General Mobilization Law.<sup>1</sup>

Concerning the question of jurisdiction in the case, the court said:

Since an offence committed on board a vessel of the Republic of China outside the territory of the Republic of China shall be considered an offence committed within the territory of the Republic of China,<sup>2</sup> the defendant's commission of an offence abroad shall be punished in accordance with the law [of the Republic of China].

\* Reported, translated into English, and edited by Dr. Hungdah Chiu, Research Associate, Harvard Law School. Footnotes added.

<sup>1</sup> Art. 11 of the National General Mobilization Law, promulgated on March 29, 1942, and effective May 5, 1942, provides that "upon enforcement of this law, the government may, whenever necessary, impose restrictions on or make adjustments in the employment . . . [or] hire . . . of employees." In accordance with this article, on April 21, 1954, the Executive Yuan (Cabinet) promulgated Measures Governing Seamen During the Period of Suppressing Rebellion (Amended, March 3, 1956). Art. 14, par. 4, of the Measures provides that "a seaman who deserts his vessel abroad or does not return to his vessel before the expiration of his leave abroad shall be punished for violating the National General Mobilization Law. . . ." According to Art. 8, par. 3, of the Provisional Act Governing Punishment for Hindering National Mobilization, as amended on December 25, 1953, a person who violates or hinders orders issued in accordance with Article 11 of the National General Mobilization Law shall be punished with imprisonment for not less than one year, detention, or a fine of not more than 1,000 yuan (U.S. \$75.00).

<sup>2</sup> Art. 3, Chinese Criminal Law promulgated on Jan. 1, 1935, and amended on Oct. 23, 1954.

## UNITED KINGDOM CASE NOTES

*Recognition of states—conditions—hostilities with “foreign state”—whether inclusive of unrecognized state—attempt to extend patent on ground of war loss—Korean War*

IN RE AL-FIN CORPORATION'S PATENT. [1969] 2 W.L.R. 1405.  
United Kingdom, Chancery Division, April 2, 1969.

Patentees, an American corporation, sought a five-year extension of their patent under Section 24 of the Patents Act, 1949,<sup>1</sup> contending that a shortage of nickel between 1950 and 1953 due to the Korean War had inhibited their full realization of the potentialities of the invention covered by the patent. Their application to the comptroller for relief was denied by an examiner, on the basis of the comptroller's decision in *Harshaw Chemical Co.'s Patent*,<sup>2</sup> in which it was held that the Korean conflict did not constitute “hostilities” within the meaning of Section 24, which referred to “hostilities between His Majesty and any foreign state,” because North Korea was not recognized as a “foreign state.” It was also held that the shortage of nickel in the period indicated was not attributable to such “hostilities.” It was subsequently shown that the comptroller had not actually ruled upon the issues raised by applicants; it was clear, however, to the applicants that an adverse decision would be likely from the comptroller, so that they would have to carry their request to the Patents Appeal Tribunal if any relief were to be obtained, a long and costly process. Applicants then instituted proceedings in the Chancery Division, seeking a reversal of the decision in *Harshaw*, apparently with the expectation that if successful in this move,

<sup>1</sup> 12, 13 & 14 Geo. 6, c. 87. (Cited by reporter.) [1969] 2 W.L.R. 1405. Sec. 24 provides in relevant parts: “(1) If upon application made by a patentee in accordance with this section the court or the comptroller is satisfied that the patentee as such has suffered loss or damage (including loss of opportunity of dealing in or developing the invention) by reason of hostilities between His Majesty and any foreign state, the court or comptroller may by order extend the term of the patent subject to such restrictions, conditions and provisions, if any, as may be specified in the order, for such period (not exceeding ten years) as may be so specified; and any such order may be made notwithstanding that the term of the patent has previously expired. (2) An application for an order under this section may be made at the option of the applicant to the court or to the comptroller: but, if the comptroller considers that an application made to him raises issues of a kind which would be more fittingly decided by the court, he may if he thinks fit refer the application for decision by the court. . . . (8) No order shall be made under this section on the application of—(a) a person who is a subject of such a foreign state as is mentioned in subsection (1) of this section; or (b) a company the business of which is managed or controlled by such persons or is carried on wholly or mainly for the benefit of or on behalf of such persons, notwithstanding that the company may be registered within His Majesty's dominions; and for the purpose of this section no account shall be taken of any loss or damage suffered by any person during any period during which he was such a subject as aforesaid, or by any company during any period during which its business was managed or controlled by or carried on as aforesaid. (9) An appeal shall lie from any decision of the comptroller under this section.” (Quoted by court.) *Ibid.* 1410.

<sup>2</sup> [1965] R.P.C. 97. (Cited by court.) *Ibid.* 1411.

they could obtain a favorable ruling from the comptroller without having to go to the Patents Appeal Tribunal.

Although the comptroller questioned the jurisdiction of the court to hear the case on an originating summons, this official was willing to have the court determine the question of whether the Korean War constituted hostilities within the meaning of Section 24 of the Patents Act. The court held that it had no jurisdiction to hear the issue raised on the originating summons because, by exercising their option under Section 24 to submit their request for an extension of the patent to the comptroller, a proceeding which provided for a restricted right of appeal, the applicants forfeited their right to bring the issue to the court, where they would have an unrestricted right of appeal. With regard to the status of North Korea, the court held that the term "foreign state" as used in Section 24 comprehended both recognized and unrecognized states and that North Korea met the conditions for a viable state, hence that the Korean War was comprehended within this section of the Act.

The court said with respect to the use of "foreign state" in Section 24:

In my judgment, the correct principle is that the word [state] must be construed in its context and given the meaning which it is considered was intended by the legislature.

Applying these principles to section 24, I have no hesitation in holding that the phrase "any foreign state," although of course it includes a foreign state which has been given Foreign Office recognition, is not limited thereto. It must at any rate include a sufficiently defined area of territory over which a foreign government has effective control. Whether or not the state in question satisfies these conditions is a matter primarily of fact in each case and no doubt there will be difficult cases for decision from time to time, but difficult cases of fact do not prevent the court from coming to a conclusion when the relevant facts are proved before it.

In the present case, apart from paragraph 4 of the Foreign Office Certificate,<sup>3</sup> there is the evidence of Mr. Frank in his affidavit of April 24, 1968, which satisfies me, see paragraphs 22 to 25 in particular,<sup>4</sup> that at the relevant time North Korea had a defined territory over which a government had effective control and that His late Majesty was engaged in hostilities with this state albeit his troops were under the command and formed part of the United Nations' forces fighting in the area.

I hold therefore that North Korea was a foreign state within the meaning of section 24 and that the applicants are entitled to proceed with the application for extension on that basis.

<sup>3</sup> The Certificate, dated July 8, 1968, provided in par. 4: "So far as the existence of authorities is concerned, this is considered to be a question of fact but Her Majesty's Government are aware that between June 25, 1950 and July 27, 1953, there were certain authorities styling themselves 'The Government of the Democratic people's Republic of Korea' exercising control over the above-mentioned area [*i.e.* the area of Korea above the 38th parallel]." *Ibid.* 1408.

<sup>4</sup> The affidavit contained a factual account of the nature of the government of North Korea and the beginning of hostilities in June, 1950. *Ibid.* 1408-1409.

In so saying it is clear that I consider that the *Harshaw* case [1965] R.P.C. 97 was on this point wrongly decided for the reasons which I have given above.<sup>5</sup>

The court pointed out that the matter of the availability of the nickel during the Korean War was a question of fact to be decided in further proceedings.

*Extradition—request for fugitive on non-extraditable charges—attempt to change request to extraditable offenses—whether plea of autrefois convict available—United Kingdom-United States Extradition Treaty, 1931—Executive discretion in extradition*

ATKINSON v. UNITED STATES OF AMERICA GOVERNMENT. [1969] 3 W.L.R. 1074.

United Kingdom, House of Lords, November 5, 1969.

The United States requested the extradition of Arthur Atkinson, who had escaped from a prison in Louisiana where he was being held after he had pleaded guilty to attempted armed robbery and had been sentenced to eighteen years' imprisonment. The facts indicated that the fugitive and an associate had gone to the flat of a woman who had advertised jewelry for sale, attempted to rob her, and when she and other members of the family had fled, had pursued them while shooting at the woman. Two policemen joined the chase, and the fugitive also fired at them. Atkinson and his associate were arrested and charged with armed robbery and attempted murder. In a plea-bargaining session before the trial, Atkinson agreed to plead guilty to the charge of attempted armed robbery, and the other charges were dropped. After Atkinson's escape, he was arrested in England on a warrant which erroneously stated that he had been convicted of armed robbery and attempted murder of the woman and two policemen. When it was shown that he had actually been convicted of attempted armed robbery, which together with prison-breaking is not an extraditable offense under the 1931 Extradition Treaty with the United States,<sup>1</sup> the Louisiana authorities requested his extradition on charges of attempted murder and aggravated burglary.

In extradition proceedings, the Chief Metropolitan Magistrate ordered Atkinson to be committed for extradition on the charges of attempted murder. He declined to commit on the charge of aggravated burglary on the ground that the offense was essentially the same as the offense of attempted armed robbery, so that the plea of *autrefois convict* would hold here. Atkinson then applied to the Queen's Bench Division for a writ of *habeas corpus*, contending (a) that he had not been "found" in the United Kingdom within the sense of Article 1 of the treaty,<sup>2</sup> because the charges

<sup>5</sup> *Ibid.* 1417.

<sup>1</sup> 47 Stat. 2122; 163 League of Nations Treaty Series 59; Cmd. 4928.

<sup>2</sup> Art. 1 provides: "The High Contracting Parties engage to deliver up to each other, under certain circumstances and conditions stated in the present Treaty, those

made against him in the extradition request had been dropped as part of the plea bargaining; (b) these charges were being made by the United States in an effort to acquire custody of his person so that he could be returned to prison; and (c) the District Attorney in New Orleans had indicated in his affidavit accompanying the request that the fugitive would be returned to prison to complete his sentence, a procedure which would violate the principle of speciality stated in Article 7 of the treaty.<sup>3</sup> The United States appealed by way of case stated on the question of whether the magistrate was authorized in law to accept the plea of *autrefois convict* in regard to the charge of aggravated burglary. The Divisional Court dismissed Atkinson's application for a writ of *habeas corpus*, granted the United States' appeal, and remitted to the magistrate with a direction to commit Atkinson on the charge of aggravated burglary.

Atkinson then appealed to the House of Lords, challenging the *bona fides* of the United States in making the extradition request and contending that an appeal by way of case stated could not be taken from a magistrate's decision in extradition proceedings. The House of Lords affirmed the decision of the Divisional Court dismissing appellant's application for a writ of *habeas corpus* but reversed that court's decision allowing an appeal from a magistrate's court by way of case stated.

It was argued on behalf of Atkinson before the House of Lords that, although there was sufficient evidence before the Chief Metropolitan Magistrate to warrant his committal on the charges of attempted murder, to revive these charges, dropped in the plea-bargaining process in Louisiana, in order to obtain extradition was "oppressive and contrary to natural justice."<sup>4</sup> Lord Reid observed that extradition with a view to compelling the fugitive to serve out his sentence, a non-extraditable offense, would violate the terms of the treaty. But if there is evidence to justify committal on the charges of attempted murder, the magistrate is not authorized to refuse committal on the grounds that this action would be oppressive or contrary to natural justice. He said:

In my view once a magistrate decides that there is sufficient evidence to justify committal he must commit the accused for trial. And there is no provision in the 1870 Act<sup>5</sup> giving a magistrate any wider power in extradition proceedings than he has when he is committing for trial in England.

---

persons who, being accused or convicted of any of the crimes or offences enumerated in Article 3, committed within the jurisdiction of the one Party, shall be found within the territory of the other Party."

<sup>3</sup> Art. 7 provides: "A person surrendered can in no case be kept in custody or be brought to trial in the territories of the High Contracting Party to whom the surrender has been made for any other crime or offence, or on account of any other matters, than those for which the extradition shall have taken place, until he has been restored, or has had an opportunity of returning, to the territories of the High Contracting Party by whom he has been surrendered.

"This stipulation does not apply to crimes or offences committed after the extradition."

<sup>4</sup> [1969] 3 W.L.R. 1074 at 1090.

<sup>5</sup> 33 & 34 Vict. c. 52.

But that is not the end of the matter. It is now well recognised that the court has power to expand procedure laid down by statute if that is necessary to prevent infringement of natural justice and is not plainly contrary to the intention of Parliament. There can be cases where it would clearly be contrary to natural justice to surrender a man although there is sufficient evidence to justify committal. Extradition may be either because the man is accused of an extradition crime or because he has been convicted in the foreign country of an extradition crime. It is not unknown for convictions to be obtained in a few foreign countries by improper means, and it would be intolerable if a man so convicted had to be surrendered. Parliament can never have so intended when the 1870 Act was passed.

But the Act does provide a safeguard. The Secretary of State [for Home Affairs] always has power to refuse to surrender a man committed to prison by the magistrate. It appears to me that Parliament must have intended the Secretary of State to use that power whenever in his view it would be wrong, unjust or oppressive to surrender the man. Section 10 of the 1870 Act provides that when a magistrate commits a man to prison "he shall forthwith send to a Secretary of State a certificate of the committal, and such report upon the case as he may think fit." So the magistrate will report to the Secretary of State anything which has come to light in the course of proceedings before him showing or alleged to show that it would be in any way improper to surrender the man. Then the Secretary of State is answerable to Parliament, but not to the courts, for any decision he may make.

If I had thought that Parliament did not intend this safeguard to be used in this way, then I think it necessary to infer that the magistrate has power to refuse to commit if he finds that it would be contrary to natural justice to surrender the man. But in my judgment Parliament by providing this safeguard has excluded the jurisdiction of the courts.<sup>6</sup>

With regard to the power of a magistrate to state a case for the opinion of the High Court as to whether his decision was correct in law, Lord Reid expressed the view that magistrates did not have this power before passage of the Magistrates' Court Act in 1952,<sup>7</sup> nor did this Act which was a consolidating Act confer such power with respect to committal proceedings as these are not final. Lord Morris of Borth-y-Gest dissented on this point, saying:

In regard, however, to the legal matters which are involved in extradition proceedings the police magistrate is the person who is designated to deal with them: he deals with them summarily and he reaches a decision which, subject only to the discretion of the Secretary of State and to whatever appeal procedure there is, will finally determine whether a person is to be released or is to be handed over to a foreign state. If an error of law leads to a decision adverse to the person con-

<sup>6</sup> [1969] 3 W.L.R. 1074 at 1091-1092, distinguishing *Connelly v. Director of Public Prosecutions*, [1964] A.C. 1254 H.L.(E.).

<sup>7</sup> 15 & 16 Geo. 6 & 1 Eliz, 2 c. 55 (cited by reporter). [1969] 3 W.L.R. 1074 at 1075. Sec. 87(1) of this Act provides: "Any person who was a party to any proceeding before a magistrates' court or is aggrieved by the conviction, order, determination or other proceeding of the court may question the proceeding on the ground that it is wrong in law or is in excess of jurisdiction by applying to the justices composing the court to state a case for the opinion of the High Court on the question of law or jurisdiction involved." (Quoted by Lord Reid.) *Ibid.* 1093.

cerned there can be correction in habeas corpus proceedings. As such proceedings are available there would be no need to ask for a stated case. If an error of law leads to a decision adverse to a foreign state, then, in my view, the magistrate has a discretion in a proper case to do what on request the magistrate did in this instance, *i.e.* to state a case.<sup>8</sup>

Lords Morris and Guest held with respect to appellant's argument that he had not been "found" in the United Kingdom that this term means only that a fugitive must be present in the United Kingdom at the time when the extradition charges were preferred against him in the requesting state.

*Extradition—conviction in absentia—procedure of extradition—whether foreign proceedings contrary to natural justice—specialty—Executive discretion in extradition—United Kingdom-Greece, Extradition Treaty, 1910*

ROYAL GOVERNMENT OF GREECE v. GOVERNOR OF BRIXTON PRISON EX PARTE KOTRONIS. [1969] 3 W.L.R. 1107.

United Kingdom, House of Lords, November 5, 1969.

The Government of Greece requested the extradition of Christos Kotronis, a Greek national, on grounds that he had been convicted by the Athens Misdemeanor Court on a charge of obtaining money under false pretenses and sentenced to three years' imprisonment. Following extradition proceedings, the Bow Street Magistrates' Court found that the extradition request conformed to the requirements of the 1910 Extradition Treaty with Greece<sup>1</sup> and the Extradition Act of 1870,<sup>2</sup> and ordered Kotronis committed to prison pending his surrender to Greek authorities. Kotronis applied for a writ of *habeas corpus* contending that he had been convicted in Greece *in absentia* and that he had only become aware of those proceedings some three years later while he was living in England. It was admitted that Greek law provides for trial *in absentia* with "substituted service" of the accused although in the instant case it was not clear that such service had conformed to the requirements of Greek law. The Queen's Bench Division granted the writ and granted leave to the Greek Government to appeal. The House of Lords reversed this decision and ordered the applicant to be committed to prison pending extradition.

It was argued on behalf of Kotronis before the House of Lords that his conviction *in absentia* was a nullity as such a proceeding violates the principles of natural justice. The appellants replied, however, that the extradition magistrate is not empowered to question the validity of a foreign criminal judgment. Lord Reid observed that an English court may question whether a foreign civil judgment violates natural justice but that a different situation obtains with respect to a foreign criminal judgment. It was clearly established by the House of Lords in *Atkinson v. United States of America Government*<sup>3</sup> that the decision to surrender a fugitive offender in extradition proceedings is a matter entirely for the discretion

<sup>8</sup> *Ibid.* 1101.

<sup>1</sup> S.R. & O. 1912, No. 193. (Cited by court.) [1969] 3 W.L.R. 1107 at 1111.

<sup>2</sup> 33 & 34 Vict. c. 52.

<sup>3</sup> See above, p. 711.



of the Secretary of State for Home Affairs; any question as to a denial of natural justice in the matter will be resolved by the Secretary of State at his discretion. Lord Reid continued:

The certificate [of conviction by a foreign court] is evidence, and, if not contradicted by other evidence, sufficient evidence that the man was in fact convicted. It appears to me to be open to the man to prove that in fact he never was convicted. But it is one thing to say he was never convicted and quite another thing to say that the law regards his conviction as a nullity. In most cases a party is entitled to show that a decision against him was in law a nullity. But if one holds that the question of denial of natural justice is not for the court, that must mean that the court is not entitled to inquire whether a foreign conviction is a nullity by reason of denial of natural justice.<sup>4</sup>

The respondent also argued that as an opponent of the Greek Government he would be detained on political charges before or in lieu of serving the sentence on the charge for which he was being extradited. Pointing out that such an act on the part of the requesting state would violate the principle of speciality contained in Article 7 of the Extradition Treaty with Greece, Lord Reid said:

So it would be a clear breach of faith on the part of the Greek Government if he were detained in Greece otherwise than for the purpose of serving his sentence, and it appears to me to be impossible for our courts or for your Lordships sitting judicially to assume that any foreign Government with which Her Majesty's Government has diplomatic relations may act in such a manner. If that is so, then Kotronis cannot take advantage of any of the provisions in the Act which empower the court to grant relief in a case of a political nature.<sup>5</sup>

Lord Morris of Borth-y-Gest observed that the magistrate's function in extradition proceedings is limited to determining whether there are grounds for committing the fugitive to prison pending surrender. He said:

Once it was proved that there was a conviction in Greece I cannot think that it was open to a magistrate or to the court in habeas corpus proceedings to go behind the conviction and to treat it as no conviction for any such reason as that the law and practice in Greece is not the same as the law and practice elsewhere. . . . It is for the courts to say whether the statutory conditions have been complied with to the extent that a fugitive criminal could be surrendered: it is for the Secretary of State to decide whether, having regard to all the circumstances, he should be surrendered.<sup>6</sup>

#### FRANCE CASE NOTE AND COMMENT

##### *Extradition—credit for time spent in detention abroad pending extradition—the law of France*

RE FRECHENGUES, Crim. October 15, 1969, B. 252, pp. 605-607.

France, Cour de Cassation, Criminal Panel, October 15, 1969.\*

<sup>4</sup> [1969] 3 W.L.R. 1107 at 1111.

<sup>5</sup> *Ibid.*

<sup>6</sup> *Ibid.* 1113.

\* Case report and comment by William Sumner Kenney, Esq., member of the Massachusetts Bar; Attorney, Criminal Division, Department of Justice. The views expressed herein are those of the author and are not to be attributed to any agency of the United States Government. Translation from French by author.

On December 28, 1967, one Frechengues was arrested in Spain and held in custody following a request for his extradition by France. On May 16, 1968, he was delivered to France and on that day was placed in detention pursuant to an arrest warrant issued by an Examining Magistrate<sup>1</sup> of Marseilles. Following his conviction the Court of Appeals of Aix-en-Provence fixed May 16, 1968, as the date from which the period of detention should be measured for purposes of computing the time to be deducted from the sentence imposed. The defendant, seeking recognition of the time spent in custody in Spain, filed with the *Cour de Cassation*<sup>2</sup> a petition<sup>3</sup> to annul the decision of the Court of Appeals on the ground that the decision violated Articles 23 and 24 of the Penal Code.<sup>4</sup> The Criminal Panel of the *Cour de Cassation* rejected the petition.<sup>5</sup>

The Court ruled that the detention which Article 24 requires to be entirely deducted from a sentence, absent a special order of the judge, is limited to pre-conviction detention imposed pursuant to a warrant of committal or arrest<sup>6</sup> issued by an Examining Magistrate. The Court further ruled that since such warrants are only effective in France, the period of detention for purposes of Article 24 is computed from the day of incarceration<sup>7</sup> in France. Measures taken by foreign authorities to insure the surrender of the accused to French authorities do not constitute a pre-conviction detention<sup>8</sup> the duration of which must be deducted from the sentence imposed.

<sup>1</sup> Juge d'instruction.

<sup>2</sup> The highest judicial court in France which is sometimes referred to as the Supreme Court. The Criminal Panel (*chambre criminelle*) reviews criminal matters brought to the court. On judicial organization in France see P. Herzog, *Civil Procedure in France* 113-168 (1967); Kock, "The Machinery of Law Administration in France," 108 U. Pa. Law Rev. 366, 375 (1960); Pugh, "Administration of Criminal Justice in France," 23 La. Law Rev. 1, 7 (1962).

<sup>3</sup> *Pourvoi en cassation*.

<sup>4</sup> Art. 23 of the Penal Code provides in pertinent part: "The duration of all punishments deprivative of liberty is calculated from the day on which the convict is detained pursuant to a final sentence." Art. 24 of the Penal Code provides in pertinent part: "When there has been preventive detention, this detention will be totally deducted from the duration of the punishment imposed by the judgment or decision of conviction, unless the judge, by special order supported by reasons, rules that this deduction shall not be given or that only a portion of the period shall be credited against the sentence."

<sup>5</sup> *Crim.* October 15, 1969, B. 252, pp. 605-607; G.P. Dec. 10-12, 1969..

<sup>6</sup> *Mandat de dépôt* or *d'arrêt*.

<sup>7</sup> In Art. 23 the word "detained" is used, not "incarcerated." Thus, a sentence commences on the day the individual is taken into custody and not on the day he is received at the penal institution. Merle et Vieu, *Traité de Droit Criminel*, No. 1356, p. 1262 (1967).

<sup>8</sup> "Détection préventive," that is, pre-conviction detention, which in the Anglo-Saxon system has until recently referred to internment for security and other such reasons. This concept in French is "internement de sûreté." Ancel, *The Protection of Human Rights in Criminal Procedure Under French Law and the Kindred Systems* 46 (1960). Recently in America the expression "preventive detention" has been used in the sense of pre-trial detention.

*Comment: Credit for Time Spent in Detention Awaiting Extradition*

Two lower courts<sup>9</sup> had previously reached conclusions similar to this decision. However, many French writers<sup>10</sup> have criticized them and have expressed contrary views.

In France the steps in seeking extradition of a person for prosecution<sup>11</sup> are as follows: the Public Ministry<sup>12</sup> assembles the basic documents. The representative of the Public Ministry at the Court of Appeals forwards these documents, the request for extradition and his recommendation to the Ministry of Justice. The documents include an authenticated copy of the warrant of arrest issued by the Examining Magistrate or of the decree of indictment<sup>13</sup> of the indicting chamber,<sup>14</sup> if the request involves an offense for which imprisonment for five years or a more severe punishment may be imposed,<sup>15</sup> or the decree of *renvoi* to the correctional court,<sup>16</sup> if the indicting chamber has found the offense to be punishable by a sentence to jail for two months or a longer period but not more than five years,<sup>17</sup> or the decree of *renvoi* to the police court<sup>18</sup> if the indicting chamber has found the offense to be one punishable by a jail sentence of less than two months.<sup>19</sup> The file is reviewed at the Ministry of Justice.<sup>20</sup> If the specific treaty of extradition requires any special documents or forms, these are added to the file which is then sent to the Foreign Minister who forwards the request through diplomatic channels to the requested state.

Thus, although the actual request for extradition is a National or Executive Act, it is based upon a judicial determination. The Court in the present

<sup>9</sup> July 27, 1870, Cour d'Appel d'Orléans (S.1870.2.325; D.1871.2.20) and Paris, June 28, 1883 (S.1883.2.177).

<sup>10</sup> Merle et Vitu, cited note 7, p. 1264; II Bouzat et Pinatel, *Traité de Droit Pénal et de Criminologie*, No.1440, p.1105.

<sup>11</sup> Merle et Vitu, cited note 7, No. 231, p. 230; Aymond, "Extradition," Nos. 270-276, *Répertoire de droit pénal et de procédure pénale* (1968).

<sup>12</sup> The representative of the Public Ministry at the Tribunal de Grande Instance is the Procureur de la République; at the Cour d'Appel, the Procureur Général. The duties of both officials are, in part, similar to those of a prosecuting attorney.

<sup>13</sup> L'arrêt de mise en accusation. This resembles an indictment but must contain an exposition and legal qualification of the acts which are the object of the accusation. Art. 215, Code de Procédure Pénale.

<sup>14</sup> The Chambre d'Accusation is a panel composed of a president who devotes full time to this assignment, and two "conseillers." This panel is designated each year from among the "conseillers" of the Cour d'Appel. Judges of the Cour d'Appel are called "conseillers." There is at least one Chambre d'Accusation within each Cour d'Appel. One of the functions of the Chambre is to act in a capacity somewhat similar to that of a grand jury. It has the sole authority to refer a "crime" to the Cour d'Assises for trial.

<sup>15</sup> A "crime."

<sup>16</sup> The panel of the "Tribunal de Grande Instance" which hears penal matters is known as the "Tribunal Correctionnel."

<sup>17</sup> A "délit."

<sup>18</sup> The "Tribunal d'Instance" when it sits to try contraventions is known as "Tribunal de Police" and is presided over by a single judge.

<sup>19</sup> A "contravention."

<sup>20</sup> Division d'Affaires Criminelles et de Grace.

decision did not discuss this aspect of the request for extradition. Of course, the requested state may allow the demanded person to remain at liberty, but if it decides to place him in custody awaiting his surrender, can it truly be said that such detention does not result from French judicial action? An unsigned note to this decision in the *Gazette du Palais*<sup>21</sup> asks the pertinent question: whether the *projet de loi*<sup>22</sup> concerning pre-conviction detention should not settle the conflict between doctrine<sup>23</sup> and jurisprudence?<sup>24</sup>

In the United States an application for extradition for prosecution of a violation of State law is forwarded directly to the Department of State by the Governor of the State or Territory. If the offense is a violation of Federal law, the application is forwarded by the Attorney General. In either case such an application must be accompanied by a duly certified and authenticated copy of the warrant of arrest issued by a judge or other judicial officer.<sup>25</sup>

The provisions of the laws of our States concerning when sentences begin and the giving of credit for time spent in pre-conviction detention vary considerably<sup>26</sup> and consequently no comment will be made concerning them. However, the Federal law<sup>27</sup> on these points is somewhat different from the French Penal Code. Under our law the allowance for total time "spent in custody in connection with the offense or acts for which sentence was imposed" is mandatory. This deduction is made not by the sentencing judge but by the Attorney General, who is the custodian of all Federal prisoners. As in the French Penal Code, the Federal statute does not specifically and expressly require the custody to be in the United States. There are no reported cases concerning the applicability of this provision to time spent in custody in a foreign country while awaiting extradition to the United States and the legislative history does not discuss the problem. Therefore, it remains to be seen whether the United States will adopt the solution of the jurisprudence or that of the doctrine of France. Or will someone propose the solution offered by the author of the note to the case in the *Gazette du Palais*, namely, legislation?

<sup>21</sup> *Gazette du Palais*, Dec. 10-12, 1969, pp. 3, 4.

<sup>22</sup> An amendment to the laws or a new law proposed by the government as distinguished from a "proposition de loi" which is offered by a member of Parliament as an individual member.

<sup>23</sup> The writings of legal scholars.

<sup>24</sup> The case law.

<sup>25</sup> Memorandum of Department of State, May, 1969; 63 A.J.I.L. 799 (1969).

<sup>26</sup> Rubin, *The Law of Criminal Correction* 301-303 (1963).

<sup>27</sup> 18 U.S.C. § 3568: "The sentence of imprisonment of any person convicted of an offense shall commence to run from the date on which such person is received at the penitentiary, reformatory, or jail for service of such sentence. The Attorney General shall give any such person credit toward service of his sentence for any days spent in custody in connection with the offense or acts for which sentence was imposed. . . .

"If any person shall be committed to jail or other place of detention to await transportation to the place at which his sentence is to be served, his sentence shall commence to run from the date on which he is received at such jail or other place of detention.

"No sentence shall prescribe any other method of computing the term."

## BOOK REVIEWS AND NOTES

LEO GROSS

### *Book Review Editor*

*International Telecommunication Control.* International Law and the Ordering of Satellite and Other Forms of International Broadcasting. By Delbert D. Smith. Leiden: A. W. Sijthoff, 1969. pp. xvi, 231. Appendices. Index. Fl. 29.50.

International telecommunication has grown dramatically in the last quarter-century, accompanied by the development, albeit lagging, of institutions, rules and practices on the national, regional and international levels to deal therewith. This book is concerned with one facet of this development, the control of international broadcasting, or more precisely, unauthorized broadcasts from the high seas and airspace over the high seas, governmental external broadcasting services, and direct broadcasts from satellites to the general public. Dr. Smith's book fully recognizes that this complex and important subject has interrelated legal, political, economic and technical aspects and carefully examines a wide variety of institutions, legal principles and practical approaches that are or may become applicable to the control of such broadcasts. The reader thus has available for the first time a wide-ranging and detailed survey summarizing current developments and analyzing prospects for control.

The author's basic thesis is that international broadcasting, as defined above, will require control, and that such control will necessitate the development and application of new concepts of international law. This view is not, however, adequately buttressed by an analysis of the actual problems that have been caused by such broadcasts. For example, while the author discusses the organization and operation of governmental external broadcasting, there is relatively little analysis of the number and nature of actual disputes, the types of programs objected to, or how such disputes have been resolved. Similarly, while there is an otherwise excellent analysis of the problem of unauthorized broadcasts from outside national territory, the scope of the problem is not adequately indicated: the number of unauthorized transmission facilities, the countries affected, whether such broadcasts are increasing or decreasing and why. The lack of such data makes it more difficult to evaluate both the gravity of the problems under study and the urgency of the need for new rules.

The book contains brief but valuable sections on the most relevant regional and international institutions, and their actual and potential rôles in international broadcasting. These sections, however, often are marred by misconceptions and omissions. For example, the book fails to recognize

that the International Telecommunication Union's regulatory responsibilities for international broadcasting are fundamentally weaker than for other forms of international telecommunication; similarly, while the section on INTELSAT is perceptive, INTELSAT's principal involvement in international broadcasting, the extensive use of its satellites for international television transmissions, is hardly discussed.

Dr. Smith concludes with detailed recommendations for a "harmful effects" doctrine and an "International Broadcasting Commission" to consider and resolve problems of unauthorized broadcasts across national boundaries. While views will naturally differ on the feasibility and merits of this proposal (this reviewer, for example, is dubious about the proposal for international licensing of transmitters operating from beyond national boundaries), the important point is that the author has provided a carefully worked out, organizationally flexible and quite specific proposal which merits serious consideration.

DAVID M. LEIVE

*Legal Order in a Violent World.* By Richard A. Falk. Princeton, N. J.: Princeton University Press, 1968. pp. xvi, 610. Index. \$15.00.

This is a collection of essays written over several years, and appraising "the relevance of international law to the management of international violence." The first three provide the framework. They express Professor Falk's conviction that the elimination of war is necessary, cannot be achieved through deterrence, and must be assured by a more centralized system of world order, which would grow out of a "transition strategy." He also states both his debt to, and his deep misgivings about, Professor McDougal's conception of international law. The next eight essays—half of the volume—deal with internal war and intervention. Professor Falk recognizes the weaknesses of present international law in this area and pleads for the observance of definite limits. He reviews U.S. practices and doctrine in Latin America, condemns American intervention in Cuba in 1951, and criticizes incisively American official policy and legal arguments toward Viet-Nam. Favorable to U.N. legislative intervention even in cases of civil strife, he is rather skeptical about the prospects of an international regulation of political propaganda. Three essays discuss nuclear weapons. He endorses the reasoning that led a Tokyo District Court to condemn their use against Japan, and recommends a no-first-use policy. A last essay, on the control of international violence in a disarming world, tries to circumscribe the opportunities for subversion and intervention in such a world.

Like all collections of essays, this one does not avoid repetition, nor does it present a complete view of the desirable world order envisaged by the author. He touches, however, on so many aspects of it, and offers so many suggestions, both for state restraints adapted to the political realities of a revolutionary world with nuclear weapons, and for more centralized "community management," that one now hopes for a systematic treatise. There, the conflicts between unilateral and collective action, between political

exigencies and legal-moral norms, between regional and global levels of decision-making, between the world-state model as a substitute for state action, especially in the realm of force, and functional models more appropriate to economic and technological realms (not considered here), could be examined more fully. Meanwhile, this volume rewards the reader with a remarkable blend of political analysis and normative concern, even though the author tends, at times, to mistake length for depth, and to be exhausting as well as exhaustive.

STANLEY HOFFMANN

*The Vietnam War and International Law*. Vol. 2. Edited by Richard A. Falk. Sponsored by the American Society of International Law. Princeton, N. J.: Princeton University Press, 1969. pp. x, 127. Index. \$25.00, cloth; \$7.50, paper.

When the first volume of *The Vietnam War and International Law* appeared, this reviewer welcomed it (62 A.J.I.L. (1968) 1000) for the contribution it made to the continuing discussion on the legality of the Vietnam War and, particularly, for having made it more easy for scholars and students alike to obtain the material which has been appearing in a multitude of different publications. That volume was published in 1968, and now Richard Falk and the Civil War Panel of the American Society of International Law have found it worthwhile to publish a further collection containing twice as many pages as its predecessor.

As is emphasized by the Editor in his introduction, there is still "no sign of any scholarly consensus emerging that might lead to the endorsement of a single, generally accepted line of interpretation of the legal issues presented by the Vietnam War" (p. 3). This point becomes very clear from the materials in Section I on "Policy Perspectives," including papers by William Bundy, on the path to involvement—"it is clear that we must steel our national capacity and resolve to continue in a tough struggle and still do those things that we must do to meet our problems at home. I find it impossible to believe that we do not have the national capacity and resolve to do both" (p. 34); by Alistair Buchan, who raises a variety of questions, concluding that "the true lesson of Vietnam is that a power of universal interests cannot afford to become so deeply committed in one corner of the globe that it loses its ability to influence events elsewhere, a mistake which the other universal power, the Soviet Union, has never made" (p. 44); by Thurman Arnold, who examines the "Growth of Awareness and Responsibility" from the point of view of both American and international law, and, though he virtually repeats the words of Mr. Bundy, his emphasis is a little different, for "today there is no safety at home in a lawless world. If we allocate the tremendous power of productive expansion with which the modern scientific revolution has endowed us to these two ends [the international burden and economic progress at home], the international law of the 20th century will be the gift of the United States to the world" (p. 58);

and by Hardy Dillard, who widens his examination to that of law and conflict, touching Cuba and the Dominican Republic as well as Viet-Nam.

Section II deals with the legal status of American involvement, with Edwin Firmage pointing out that there are in fact two sovereign states in Viet-Nam, enabling him to contend that the internal war became internationalized not by American actions, but by the commitment of North Vietnamese forces (p. 117). Charles Chaumont of the University of Nancy points out that the war goes beyond Viet-Nam and is a global problem which has taken on an independent symbolic value because of the American involvement (p. 155). This French analysis should be compared with Dr. Iscart's "*Les Conflits du Viêt-nam—Positions Juridiques des Etats-Unis*" in Volume 12 of the *Annuaire Français*. Professor Schick examines some of the legal controversies and concludes "that the intervention of the United States cannot be defended on strictly legal grounds" (p. 205), a view that should be measured against some of the problems considered by David Johnson of London in his setting of the war against the just war concepts of Aquinas and Grotius. The other papers in this section are contributed by Cornelius Murphy, the editor and Jaro Mayda.

The rôle of the United Nations forms the subject of Section III, with papers by Oscar Schachter, Lincoln Bloomfield and Max Gordon. Then come a number of papers dealing with the laws of war, and particularly the position of prisoners of war and the relevance of the Geneva Convention, with Lawrence Petrowski questioning the legality of some of the weapons used by both sides (pp. 506-507), and Howard Levie supporting the view that the North Vietnamese have *prima facie* a right to try United States pilots for alleged war crimes in connection with their bombing raids (p. 388). This is not to say that such pilots have committed war crimes, and it may well be that recent disclosures like that concerning Song My may cause early publication of a third volume in which the whole problem of war crimes and their punishment by both sides may constitute the bulk of the material.

The relation of the war to the Constitution is examined in Section V, with Gidon Gottlieb posing the general problem of Viet-Nam and civil disobedience; Lawrence Velvel entitling his contribution "The War in Vietnam: Unconstitutional, Justiciable and Jurisdictionally Attackable"; and Francis Wormuth not going quite so far, but calling his "The Vietnam War: The President Versus the Constitution." The Section closes with the decision in *U.S. v. Mora* (389 U.S. 934), in which the Supreme Court denied certiorari, with Justices Douglas and Stewart dissenting.

The final two Sections deal with thoughts on settlement and the relationship between law and foreign policy, giving us McGeorge Bundy's address at DePauw University in October, 1968, and Stanley Hoffmann's views on Viet-Nam and American foreign policy. Finally there is a documentary appendix, giving the 1968 manifesto of the North, the working paper of the State Department on the rôle of the North in the war, the 1968 Honolulu Communiqué, the Northern Declaration of Independence



in 1945, the 1946 Preliminary Convention between France and Viet-Nam and the Fontainebleau Modus Vivendi of the same year.

The Editor and his Committee once again place us deeply in their debt for the material they have provided and their contribution to the continuing debate on this issue. As Hardy Dillard points out, "the dialogue on Vietnam should continue unabated even if it makes uncomfortable the wielders of power. For democracy is rested on the premise that the wielders of power are not omniscient, and it is not the decisions alone that count but the way they are reached" (p. 84).

L. C. GREEN

*Cases and Materials on International Law.* By Wolfgang G. Friedmann, Oliver J. Lissitzyn, and Richard Crawford Pugh. (American Casebook Series.) St. Paul, Minn.: West Publishing Co., 1969. pp. xl, 1205. Table of Cases. Index. \$15.00.

Social scientists who doubt that international law deals with a vast range of activities that can be classified as international relations need only tabulate the subjects covered by the materials selected by Professors Friedmann, Lissitzyn, and Pugh. If a scholar were to do so, and if he were to make a comparison with casebooks of earlier vintage, he would find evidence of the expansion of international law to which Professor Friedmann calls attention in *The Changing Structure of International Law* (1964). Undoubtedly, much of the material deals with international relationships that the social scientist would characterize as secondary, that is, not dealing with the great issues of crisis, war, and peace, which are as much failures of politics, diplomacy, and power as of law. Conversely, it can be argued that the Friedmann-Lissitzyn-Pugh demonstration of the international law specialists' concern with routine as well as the dramatic and with the activities of individuals and private organizations as well as states and international organizations is evidence of international lawyers' realization that foundations and supports must be built before the roof of peace can be put on the structure of international relations.

Indeed, since approximately twice as many selections are from treaties, General Assembly resolutions, and other expressions of states' consensual and unilateral legal stances as from judicial decisions, it would appear that several statesmen, diplomats, and bureaucrats have some genuine concern about foundations of the international system. At the same time, the ratio of judicial decisions to selections from other materials represents another step in the evolution of the casebook from a collection of national cases and Attorneys-General's opinions through a concentration on international judicial and arbitral decisions to the output of contemporary procedures for the genesis and evolution of international legal norms.

In terms of topics covered, there are significant changes from what once appeared in casebooks on international law. The once lengthy sections on nationality and extradition, perhaps generators of some measure of the alleged irrelevancy of international law, are reduced to what is relevant

to jurisdictional questions. Topics of contemporary relevance include the following: new processes of change; intergovernmental and private corporations; archipelagos; the deep-sea floor; pollution; nationality of and jurisdiction over space vehicles; legal security for international trade and foreign investment; aggression and self-defense; peacekeeping; nuclear armaments; intervention and internal war; global and regional organizations concerned with social, technical, and economic co-operation. As for more traditional subject matter, it would be difficult to produce a more up-to-date and, to use the term popular with activist students, "relevant" collection of materials than the editors have assembled.

If the authors are to be faulted, it can only be for the paucity of selections from Continental European, Latin American, Communist, and non-Western sources and perhaps also for finding that Columbia University faculty members have produced more than one fourth of the selections from American authors that warrant reproduction. The latter probably represents the editors' desire to provide continuity in their assemblage of documentary materials, scholarly writings about the law, and their own supplementary notes. The former, although not entirely ignoring the non-Anglo-Saxon world, undoubtedly represents the editors' teaching experience that includes several years of experimentation with materials expressive of the most recent developments in international law. That experience has produced an excellent instrument that many teachers will appreciate, including teachers in political science departments for whom the constraints of a non-legal orientation and, often, one-term classes may impose the limitation of using the Friedmann-Lissitzyn-Pugh casebook only for outside reading assignments.

WESLEY L. GOULD

*From International to World Law.* By Percy E. Corbett. Bethlehem, Pa.: Lehigh University, Department of International Relations, 1969. pp. 40.

For some twenty years scholars have been challenged with the suggestion that a new science of international law was in the making and that we might now describe international law as world law, having in mind the limitations that world law might have upon the sovereignty of states which, by its very name, seemed to block progress towards a community of nations under the rule of law. A half-dozen scholars come to mind: McDougal, with his emphasis upon a sociological approach to the law; Jessup, with his emphasis upon the gaps in the law and the activities outside the existing range of the law; Jenks, with his utopian presentation of a *Common Law of Mankind*; and others, summed up and analyzed in Kunz's *Changing Law of Nations*.

Professor Corbett's monograph, bearing the provocative title *From International to World Law*, presents the problem clearly and forcefully: the actual and potential integrating effects of the wide variety of international business activities and of governmental and non-governmental co-operation in the field of foreign aid, technical assistance and economic development—

do they add up to World Law? The problem of controlling international violence comes first, but is set aside as unhappily showing little progress. A more encouraging study of human rights follows. Then comes a careful analysis of Jenks' important contribution showing the establishment of a trend towards "an integrated human community under a common law." The International Chamber of Commerce, operating under a powerful multinational corporation, has been active in the promotion of arbitration and of the unification of national laws affecting international business. A "New Law Merchant" which is evolving around the operations of private international enterprises is attracting the attention of lawyers and creating a number of research centers under university auspices. The International Labor Organization is analyzed in respect to its activities contributing to the growth of world law.

Professor Corbett finds that his survey shows "a marked advance in integration" in the last half-century, but that in spite of the activities of the various agencies crossing state boundaries there will be need of some form of centralized control, a task calling for "a fusion of historical, economic, political, sociological and legal approaches." The proliferation of specialized agencies will not of itself create the sense of community life needed to describe their activities as "world law," taking the term in a technical sense, important as that description might be in the pursuit of the great objective.

C. G. FENWICK

*Studies in International Adjudication.* By R. P. Anand. Delhi: Vikas Publications; Dobbs Ferry, N. Y.: Oceana Publications, 1969. pp. vii, 298. Index. Rs. 34.

Professor Anand has added another significant volume to his informed and clear-headed studies of international adjudication, including his earlier book, *Compulsory Jurisdiction of the World Court* (1961). The topics of this collection are well selected for introducing the student to both sanguine and gloomy prognoses for this mode of settlement of international disputes.

Anand deals with important aspects of international adjudication, such as the effects of international politics and public opinion in the United States on the rôle played by that state in the history and prospects of the International Court of Justice (pp. 1-35), the contribution of the Court to the development of international law (pp. 53-72), the notion of impartiality in inter-state justice (pp. 73-118) and the rôle of separate and dissenting opinions in global adjudication (pp. 119-217). The controversial *South-West Africa Cases* are examined in some depth (pp. 119-151).

Moving beyond the field of adjudication, Anand examines the attitudes of the "new" Afro-Asian states towards the Court (pp. 53-72), offering simultaneously a study of the Indian reservations to acceptance of jurisdiction (pp. 36-52). The last two chapters of the book under review deal with the award of the *ad hoc* Tribunal on the dispute between India

and Pakistan on the Rann of Kutch (pp. 218-249) and with the problems of execution of international judicial awards (pp. 250-286).

As between the more sanguine and more gloomy prognoses for international adjudication, Professor Anand leans towards the former, sometimes to a fault. And this fault is occasionally joined by another which, most of the time, he succeeds in avoiding. This is the tendency to indulge the presumption *omnia praesumuntur rite esse acta* in favor of non-Western states. These faults notably appear in relation to three matters. In his able discussion of the *South-West Africa Cases* his critical approach to the 1966 Judgment reads rather incongruously with his final recognition of the impotence of the political organs on the same matter. In relation to the political organs (p. 151) he indicates sadly the intractability for such organs of the conflict involved between the directives of "justice" and of "peace" which sets limits on political action. Yet if that is a correct diagnosis, his earlier criticisms of the International Court's decision of 1966 (p. 142) amounts to a demand that the Court should have laid itself down in self-immolation between the hammer of "justice" and the anvil of "peace" (war). Some rethinking seems still called for on these fundamental matters. Professor Anand shows at numerous points an admirable independence of judgment *vis-à-vis* policies of some Asian and African states, including India. It is a forgivable lapse that, while generally critical of resort by states to forceful self-help, he manages to give an account of India's reaction to the Court's judgment in the *India-Portugal Right of Passage Case*, which makes no direct reference to India's use of force to annex Goa (pp. 266-267). A related tendency is perhaps apparent in the author's account of the rôles of United Nations organs in relation to enforcement of legal rights, where the grosser problems of prejudgment and bias arising from voting strengths and set diplomatic stances are quite glossed over.

These are minor blemishes of a kind which affect in greater or lesser degree, and in one direction or the other, the works of all international lawyers, Western, Asian, Latin American or African, in the present traumatic age. It is, indeed, remarkable that this work has so few of them; and it is apparent that he is at constant pains himself to detect and overcome them.

This new book, like his earlier volume, affords ample evidence of the author's stature as an international lawyer, and his widening interests in the field of international adjudication. Coming as it does from a leading Asian scholar, it is to be welcomed with particular warmth, in view of the distrust (even before the *South-West Africa Cases*) of the International Court by many Asian states. It augurs well also for the progress of the study of international law at the Indian School of International Studies in New Delhi, of which the author is a professor.

JULIUS STONE

*Territorial'noe more.* By A. N. Nikolaev. Moscow: izd-vo Mezhdunarodnye otnosheniia, 1969. pp. 158.

Dr. Nikolaev's earlier views on territorial waters are well known to many readers of this JOURNAL. Now professionally associated with the legal office of the U.S.S.R. Ministry of Foreign Affairs, Nikolaev served as a member, and in 1960 as deputy chairman, of the Soviet Delegation to the Geneva Conferences on the Law of the Sea. In a volume published in 1954,<sup>1</sup> Nikolaev championed the right of states to fix the breadth of their territorial waters in accordance with their interests and to exercise full sovereignty over such waters (also averring, in a little noticed passage, that claims beyond 12 miles were of doubtful validity). Nikolaev criticized his colleagues for using the expression "territorial sea," vigorously defended the peculiar Soviet doctrine of historic waters, urged that stationary shore ice be equated to land when measuring territorial waters, and denied the existence of a right of innocent passage in international law. Although he wrote in a sternly polemical style typical of the early 1950's, the wealth of citation to Soviet legislation and practice made this an important post-Stalin work on international law.

Nikolaev's new monograph, the most thorough account yet published in Russian of the deliberations in the International Law Commission and at Geneva relating to the territorial sea, reflects the extent to which Soviet maritime interests have changed in the past fifteen years. While Nikolaev still tends to ascribe Western positions on the law of the sea to wholly base motives, it is apparent that the U.S.S.R. is beginning to assume the legal posture of a major maritime Power and will be less tolerant of "coastal interests" than formerly. In contrast to his earlier preoccupation with justifying expansive claims to coastal jurisdiction seaward, in this study Nikolaev is deeply concerned with unjustified encroachments, principally by Latin American states, upon the freedom of the high seas. Conceding that "a number of delegations" criticized the Soviet proposal to the 1958 Geneva Conference as being too "indefinite," Nikolaev cites the International Law Commission as authority for the proposition that 12 miles is the *maximum* permissible limit for territorial waters in international law. To bring order out of chaos, Nikolaev concludes that it would be advisable "to convene a Third U.N. Conference on the Law of the Sea to draft and adopt a maximum norm of the breadth of territorial waters and of fishing zones, *taking into account both the national interests of coastal states and the interests of the entire international community.*" [Emphasis added.] What position the U.S.S.R. might take at such a conference is left to conjecture. It would not be unreasonable to infer from Nikolaev's views, however, that the Soviet Government will seek acceptance of a 12-mile maximum limit for territorial waters and

<sup>1</sup> Problema territorial'nykh vod v mezhdunarodnom prave, reviewed by Oliver J. Lissitzyn in 49 A.J.I.L. 592 (1955).

may be willing to compromise on the issue of innocent passage for all vessels through straits.

WILLIAM E. BUTLER

*Wider Acceptance of Multilateral Treaties.* UNITAR Series, No. 2. New York: United Nations Institute for Training and Research, 1969. pp. xvi, 213.

The decision of the United Nations Institute for Training and Research to launch a series of studies in the field of international law is welcome and it has been well launched with this study.

Many scholars and practitioners over the years have expressed concern at the relatively small number of states which have become parties to multilateral conventions. As the study points out, "[a]s of 31 December 1967, the 55 'general' multilateral treaties [adopted under U.N. auspices] had received an overall total of . . . about 27 per cent of the maximum attainable number of acceptances by the 132 States" eligible to become parties. Almost every expert has his list of explanations for this sorry state of things and many of them have suggested cures. Now for the first time an extensive statistical analysis has been made in an effort to isolate extrinsic factors which are a source of delay and steps which might be taken to promote speedier and wider acceptance.

The study properly takes as an *a priori* the notion that wider acceptance of treaties is a good thing. The study seeks to isolate factors which statistical data indicate play a rôle in delay. Among the factors analyzed are national administrative machinery, constitutional requirements, modes of acceptance, problems relating to succession and the relation of reservations to acceptance.

The effectiveness of methods used by international organizations to foster acceptance of treaties is also examined; namely, the promotional approach (exhortation and publicity), that of requesting governments to report on steps they are taking, dissemination of information and the provision of technical assistance, and even that of revision of the instrument.

If the study contains few surprises, it nevertheless makes a significant contribution in documenting what has been only suspected or guessed at in the past. If one were to fault the study it would be on the ground that it has been too cautious. A bunt is the percentage play sometimes but home runs win more ball games. In light of the power in the line-up (Mr. Nawaz, Professor Fried, Mr. Therattil, Mr. Schachter) one wishes a few more big swings had been taken. For this reason, and because it is so difficult to isolate external impediments from substantive objections, the portion of the study devoted to measures to foster acceptance is perhaps the stronger part of the study.

The data are clearly presented so the reader may draw his own conclusions. No one seriously concerned with the field as scholar or practitioner can afford to ignore the study.

ROBERT B. ROSENSTOCK \*

\* The views expressed are those of the reviewer and not those of the U. S. Government.

*Die Aufhebung völkerrechtlicher Verträge im deutschen parlamentarischen Regierungssystem.* By Hermann-Wilfried Bayer. Max-Planck-Institut für Ausländisches Öffentliches Recht und Völkerrecht, Beiträge, No. 48.) Cologne and Berlin: Carl Heymanns Verlag KG, 1969. pp. xvi, 270. Index. DM. 48.

This study centers on the *treaty-terminating power* under the current German parliamentary system. In particular, it deals with the question of whether, despite the silence of the Fundamental Law (*Grundgesetz*) on the point, a rule may be inferred from that law which, based on the premise of the *contrarius actus* principle, requires that the same parliamentary procedure which has to be observed in the exercise of the *treaty-making power* must be applied in governmental action on the termination of a treaty.

The author concludes that the denunciation of a treaty (*Kündigung*) does *not* require the concurrence of the legislature (pp. 215 and 253). He arrives at this finding after thorough scrutiny and analysis of the rationale of Article 59, Sec. 2, of the Fundamental Law, state practice and the pertinent literature. Although the author is familiar with the opposite view, advanced by Friesenhahn, Stelzig and H. W. Baade (pp. 202-204), he deems this view not persuasive, and contends that the *Monopoltheorie*, that is, the theory which holds that the denunciation even of such treaties whose conclusion requires the concurrence of Parliament is a matter exclusively reserved to the Federal Government (p. 206), finds support in the wording of the Fundamental Law and is reflected in the predominant view of German legal theory and practice (p. 215). He agrees, however, that termination of a treaty by mutual consent, *i.e.*, by means of an *Aufhebungsvertrag*, requires concurrence of the legislature under Article 59, Sec. 2, of the Fundamental Law (p. 211).

Under international law the right of a state to terminate a treaty may be based on an express clause to this effect (pp. 18-20) or on a principle of customary international law, *e.g.*, the rule that a treaty may be terminated by a party because of the breach of a treaty obligation by another party to that treaty (pp. 21-25). The author carefully examines and skillfully analyzes a considerable variety of views on the legal nature and effect of the *clausula rebus sic stantibus* (pp. 25-36); he infers from recent developments in the practice of states that the *clausula* generally does not confer a right to denounce a treaty, but rather a right to request a revision of a particular treaty (p. 254).<sup>1</sup>

The author observes that there is no general rule of customary international law which designates the organ of a state which is empowered to denounce or otherwise to terminate a treaty (p. 62). Accordingly, reference is usually made to the applicable rules of constitutional law, if any. In the Fundamental Law no clear-cut answer to this question is expressly provided for. It may be inferred, however, from Article 59, Sec. 1, that

<sup>1</sup> See, however, Art. 62 of the Vienna Convention on the Law of Treaties concerning "Fundamental change of circumstances," in U.N. Doc. A/CONF. 39/27, May 23, 1969, p. 30; and 63 A.J.I.L. 875 at 894 (1969).

the Federal President, subject to the countersignature of the Federal Chancellor, is empowered to issue unilateral declarations such as denunciation of a treaty, while termination by mutual consent of the parties to a "political treaty" or to a "law-giving treaty" (*gesetzesinhaltlicher Vertrag*) requires concurrence of the legislature pursuant to Article 59, Sec. 2.

In addition, Chapter 2 of Part III of the book is of particular interest; it is designed to provide some comparative legal analysis. It covers the specific provisions relating to the denunciation or termination of treaties in Article 28 of the 1946 Constitution of France and Article 64 of the 1956 Constitution of The Netherlands, and includes an informative treatment of the principal legal issues involved in the termination of treaties under the constitutional law of the United States, Austria and Switzerland.

The discussion of the impact of constitutional limitations on the treaty-making power on the international validity of treaties in terms of the "relevance theory," "irrelevance theory," and "evidence theory" on pp. 52-61 appears to this reviewer as not very fruitful, although it must be conceded that there is some merit in the author's criticism of the evidence theory (*i.e.*, the theory underlying Article 43 of the Draft Convention on the Law of Treaties of the International Law Commission,<sup>2</sup> which holds that a state may revoke its consent to be bound by a treaty if such consent has been given in a manner manifestly in violation of internal law) that the practical applicability of this theory depends on a workable distinction between manifest and other violations of constitutional norms.<sup>3</sup>

Part II which deals with the co-operation of Parliament in the conclusion of treaties under German law (pp. 69-180) contains a very detailed survey of this question, taking into account the 1871 Constitution of the Reich, the Weimar Constitution and the Fundamental Law. As regards the Fundamental Law, the author's comments on Mosler's distinction between the foreign relations power in the substantive and the formal sense (p. 160) and on the Transformation doctrine and the Implementation doctrine (pp. 172-176) are timely, though not always persuasive.

The book is well documented.

HANS AUFRICHT

<sup>2</sup> See Art. 46(1) of the Vienna Convention on the Law of Treaties in U.N. Doc. A/CONF. 39/27, May 23, 1969, p. 23; and 63 A.J.I.L. 875 at 890 (1969).

<sup>3</sup> See on this point Art. 46(2) of the Vienna Convention on the Law of Treaties, *ibid.*, which reads: "A violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith." In this connection it may be mentioned that the Legal Departments of the International Monetary Fund and of the International Bank for Reconstruction and Development have for many years requested prospective members to submit, prior to their acceptance of membership, a Memorandum of Law, signed by the Minister of Foreign Affairs or the Minister of Justice, setting forth the law and practice of the prospective member in regard to acceptance of international agreements and to attach copies of laws, decrees or of specific provisions of laws or decrees referred to in the Memorandum of Law. This practice of the Bretton Woods Institutions effectively precludes all speculations and presumptions concerning constitutional limitations on the treaty-making power of prospective members; see IMF, Information on Filing Application for Membership (January, 1965), pp. 4 and 15.



*Legislative Powers in the United Nations and Specialized Agencies.* By Edward Yemin. Preface by Michel Virally. Leiden: A. W. Sijthoff, 1969. pp. xx, 227. Bibliography. Fl. 28.

The growth of international organizations inevitably strains conceptions of international law built upon older assumptions of state sovereignty. We intuitively recognize that some measure of control has passed from states to international organizations, but in this, as in other aspects of international relations, intuitive judgments must be weighed against more public forms of knowledge. Changes in the structure of international relations resulting from decades of change from many sources have necessarily proceeded in a piecemeal, incremental fashion. Thus influence has passed from states to organizations in a slow, almost accidental manner, such that we cannot clearly say when, how, or whether some significant threshold has been crossed.

Mr. Yemin seeks to examine systematically this perceived shift by asking whether we have indeed passed into an era when organizations can and do legislate for states. He clearly believes that we have, even after giving due weight to the fact that states continue to preserve all manner of escape routes from unwanted obligations.

One cannot fault Mr. Yemin on his meticulous use of the armamentarium of traditional legal research. Yet it is worth asking whether the answer to his question really lies in the interstices of official documents and legal treatises. M. Virally, in a thoughtful Preface, tells us that the crisis of contemporary international law is merely the reflection of massive changes in international society. If that is so, we may well ask why Mr. Yemin has so rigorously directed himself at describing the reflection alone. For he has sought no evidence from the real lives of the human beings who comprise states and organizations. By examining their legal artifacts alone, he keeps us and himself at one more remove from behavioral data. It is invariably an unfair criticism to ask of an author that he write a different book; nonetheless, Mr. Yemin's serious and detailed monograph is the victim of its virtues. The author's single-minded concentration on legal sources enables him to build and sustain an internally secure argument. But the genuine test of his hypothesis inevitably lies outside the material to which he has committed himself. No real attention is paid to the effects of political, social, and economic environments; the dynamics of organizations; or of the state of scientific knowledge, upon which so many of the specialized agencies depend.

Mr. Yemin details the legal life of the United Nations itself, the International Telecommunication Union, the Universal Postal Union, the International Civil Aviation Organization, the World Meteorological Organization, and the World Health Organization. In so doing, he presents the spectrum of legal possibilities. Why the possibilities exist, why some are more probable than others, what factors determine which are used—these intriguing questions lie outside the capabilities of traditional legal methods.

MICHAEL BARKUN

## BRIEFER NOTICES

*The Middle East Crisis: Test of International Law.* Edited by John W. Halderman. (Dobbs Ferry, N. Y.: Oceana Publications, 1969. pp. viii, 193. \$7.50.) The twelve papers in this volume were originally prepared for a symposium held at Duke University in March, 1968, under the sponsorship of the American Society of International Law. They represent an effort to examine various aspects of the Arab-Israeli conflict not only in terms of rights and duties under existing international law, but also in terms of what further principles and procedures might be developed to prevent, minimize, or resolve such conflicts. The contributors include three Arab representatives at the United Nations (George Tomeh of Syria, Muhammad El-Farra of Jordan, and Nabil Elaraby of the U.A.R.), one Israeli jurist and diplomat (Shabtai Rosenne), and nine American scholars (the editor plus Quincy Wright, Don Peretz, Leo Gross, Majid Khadduri, Luke Lee, Shepard Jones, and Thomas Franck in collaboration with Kenneth Gold).

Ironically enough, so little progress has been made on the Arab-Israeli situation in the last two years that the papers are in large part as timely today as when they were prepared. Professor Wright's over-all view of the legal issues involved (he identifies thirteen, although one may not agree with his analysis in all respects) is especially useful background. On particular aspects of the problem which are still with us—Suez, Aqaba, Jerusalem, the Arab refugees, and the tangled ineffectiveness of the United Nations—the materials also continue to be valuable. Only on the more recent issue of the Palestine liberation movement and on the interesting question of the application of the laws of war to the present situation does the volume have little to offer. It is an enlightening work, both for the Arab-Israeli problem in particular and for broader thoughts on how to devise an international legal system adequate to deal with such conflicts fairly and firmly.

RICHARD YOUNG

*The Life and Legal Writings of Hugo Grotius.* By Edward Dumbauld. (Norman, Oklahoma: University of Oklahoma Press, 1969. pp. xiv, 206. Bibliography. Index. \$4.95.) This handsome small volume is evidently a work of love by Edward Dumbauld, Secretary of the American Society of International Law and Federal District Court Judge for the Western District of Pennsylvania. A short introductory section outlines the principal known facts of the life of Grotius. The bulk of the book is a learned jurist's descriptive analysis of Grotius's five major surviving legal works: *De Jure Praedae*, *De Jure Belli ac Pacis*, *Apologeticus*, *Inleidinge tot de Hollandsche Rechtsgeleerdheid* and *Florum Sparsio ad Jus Justinianum*. Judge Dumbauld writes with a scholar's knowledge not only of Latin but also of the Dutch language; he holds a law degree from the University of Leyden. His analyses of the legal thought of Grotius are very clear, although, of course, highly condensed. The bibliography is annotated with useful comments regarding the value and scope of the principal editions of Grotius's works and some of the most important works by others about Grotius.

A minor fault is the use of phrases like "due process" (p. 106) and "all deliberate speed" (p. 159) in a context so far removed from the

Constitutional problems those phrases represent to American lawyers that the flow of language, otherwise smooth, is disrupted. Yet it is clear that the author is addressing his book primarily to lawyers familiar with Anglo-American common law (or, to judge by notes 113 and 114 on p. 143, even the particular law of Pennsylvania). It is probable that Judge Dumbauld does not himself take too seriously the possibility he mentions that Grotius anticipated "the binary functioning of present-day computers" (p. 173).

One typographical error that slipped through the erudition of the author and proofreader can serve the happy function of demonstrating the erudition of the reviewer. The Emperor making the pilgrimage to Canossa, mentioned in note 104 on p. 118, was Henry IV, not Henry VI.

ALFRED P. RUBIN

*The Treaty Trap: A History of the Performance of Political Treaties by the United States and European Nations.* By Laurence W. Beilenson. (Washington, D. C.: Public Affairs Press, 1969. pp. xvi, 344. Index. \$7.00.) The statement in the Foreword to this polemic that the author "did not start out with preconceived notions about the efficacy and value of treaties" stretches credulity. With the assiduity of a Sunday-School scholar dredging up pearls of smut from the Old Testament (apologies to H. L. Mencken), the author has spent years enthusiastically searching for violations of treaties. His conclusion that "treaty-reliance" is "an occupational disease of statesmen" (p. 58) likely to assume epidemic proportions in the United States (p. 216), is not limited to so-called "political" treaties, a category which he neglects to subject to legal analysis. A certain ambivalence affects the author: he lists with patriotic pride a distinguished list of statesmen—from George Washington to Lyndon Johnson—who "participated in substantial breaches of treaties" (pp. 54-55); he regrets that some of them did not go "all the way" (e.g., as in the Bay of Pigs affair, p. 45); but he nevertheless gloats over the violations as "proof" of the inadequacy of international law. The author's pretensions to scholarship include a bibliography of some 600 items (22 pages). Although the list includes works by Thucydides, Machiavelli, de Gaulle, and that distinguished authority on the law of treaties, J. Edgar Hoover, it has managed to exclude Lord McNair, the Harvard Research in International Law, the Restatement of Foreign Relations Law, the work of the International Law Commission and the Vienna Conference on the Law of Treaties, or the frequent references of the Permanent Court of International Justice and the International Court of Justice to the law of treaties. By way of compensation, perhaps, Jack Benny is cited by analogy (p. 221) for the author's conclusion: "In relying on treaties, the short guide is simply 'don't'."

HERBERT W. BRIGGS

*Chugoku kankei joyaku torikime mokuroku* [Catalogue of Treaties and Agreements Concerning China]. By Nagamichi Hanabusa. (Tokyo: Keio tsushin, 1969. pp. 423. \$8.40.) This is a very welcome calendar of 1,291 treaties, conventions, agreements, protocols, contracts, exchanges of notes, and of legislation relating to foreign trade and other relations which were concluded, transmitted, or adopted by China from 1689 to 1949. Compiled by a Japanese scholar, the volume is divided into two basic parts: the first lists instruments chronologically by date of signature from the Ch'ing and Republican periods; the second orders the same material by country. Each entry contains the name of the treaty or act and the dates of signature and ratification or adoption; entries in the first part also contain references to textual sources. The titles of most documents appear both in Japanese

and English. The broad scope of the calendar and the compiler's usage of official and unofficial Japanese collections of treaties and documents to discover items unknown to many Western collections make this volume an essential addition to law libraries. However, the failure of the compiler to consult other basic sources (Slusser-Triska calendar of Soviet treaties; official Republic of China collections; and others) has resulted in the omission of many major items. The preparation of a thorough calendar remains for the future.

WILLIAM E. BUTLER  
R. RANDLE EDWARDS

*Status and Problems of Very Small States and Territories.* UNITAR Series, No. 3. (New York: United Nations Institute for Training and Research, 1969. pp. viii, 230.) This is the third in a continuing series of research papers prepared under the auspices of UNITAR. Not surprisingly, it reflects some of the Institute's strengths and weaknesses. On the plus side, the scope of the study is much broader than that of other studies of mini-states and territories. Especially instructive are the chapters dealing with historical factors for the separate existence of small territories; special problems smallness creates in the conduct of foreign relations; and, significantly in light of UNITAR's special place within the United Nations Organization, the kinds of assistance which that Organization might render to very small states and territories.

Jacques Rapoport, who is principally responsible for this work, is perhaps best known to members of the Society for the scholarly paper he delivered at its 1968 Annual Meeting (on the participation of mini-states in international affairs). Indicative of the unique resources upon which he has been able to draw is the useful chapter on public administration problems which was prepared by the Division of Public Administration in the U.N. Department of Economic Affairs. A less successful resort to non-Institute sources is the statistical annex, which differs in tone and comprehensibility from the rest of the study.

UNITAR's political sensitivity may account for omissions. Understandably, combustible materials are handled gingerly; names are not named when the captions are critical. Less justifiable, for a work of this quality, is its uncritical deference to the monotonous utterances of the so-called "Committee of Twenty-Four."<sup>1</sup> The study gains little from its conjugation of that Committee's hopelessly intransitive verbs in all their moods, tenses and inflexions.

EDWARD GORDON

*The British Year Book of International Law, 1965-1966.* Vol. 41. Edited by Sir Humphrey Waldock and R. Y. Jennings. (London, New York, Toronto: Oxford University Press, 1968. pp. viii, 517, Index. \$15.50.) Contributions of solid worth characterize *The British Year Book of International Law*. In "Enactment of Law by International Organizations," Krzysztof Skubiszewski, after a comprehensive analytical study, concludes that lawmaking acts of international organizations are a source of the law of nations distinct from treaties: lawmaking resolutions of international organizations are not contractual instruments governed by the law of treaties. Discussing "The Legislative Techniques of the International Labour Organization," J. F. McMahon explains, *inter alia*, why no reservations are permitted to international labor conventions, why substantial reliance is

<sup>1</sup> The full name of this group is Special Committee on the Situation with Regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples.

placed on *travaux préparatoires* in their interpretation, and how over a period of some forty years the International Labor Office has given nearly 100 interpretative opinions on labor conventions and recommendations, none of which opinions has ever been challenged on the merits. R. R. Baxter writes on "Multilateral Treaties as Evidence of Customary International Law," but takes a perhaps unduly restrictive view of codification. In an informative article on "A Generation of Canadian Experience with International Claims," Charles V. Cole speculates, incidentally, on whether Canada might not have been in a better jurisdictional position than the United Kingdom or the United States to challenge Bulgaria before the International Court of Justice in the *Aerial Incident of 27 July 1955* case because her position in accepting the compulsory jurisdiction of the Permanent Court was closer to that of Bulgaria. J. E. S. Fawcett discusses "Security Council Resolutions on Rhodesia"; D. S. Wijewardane, "Criminal Jurisdiction over Visiting Forces with Special Reference to International Forces"; Margaret Buckley, "The Effect of the Diplomatic Privileges Act 1964 in English Law." There are also legal notes, case notes and book reviews.

HERBERT W. BRIGGS

*The International Protection of National Minorities in Europe.* By Tore Modeen. (Abo: Abo Akademi, 1969. pp. 182. Annexes. Index.) This is a summary survey of the protection of minorities in Europe, beginning with the Vienna Peace Treaty of 1815 and ending with the recent efforts in this area by the United Nations, UNESCO, and the Council of Europe. The bulk of the book is devoted to post-World-War-II developments. The Peace Treaties of 1947, the Austrian State Treaty of 1955, the South Tyrol Treaty (in the meantime replaced by the Copenhagen Austro-Italian Agreement of Nov. 30, 1969), the Trieste Treaty—all are scrutinized from the viewpoint of contents and effectiveness of their provisions for an enforceable regime of protection of national minorities. The same criteria are used in the analysis of the United Nations, UNESCO, and the Council of Europe instruments. The author finds little reason for comfort in them. In the concluding section of the book he pleads for a system of protection of minorities *qua* minorities under international law. The six-page list of sources and literature is impressive.

Without in any way disputing the soundness of the author's judgments, some basic problems of the subject matter were left without due consideration: the two concepts of minorities—the statistical (*e.g.*, in Switzerland) and the political-legal; politicization and depoliticization of the problem of minorities in the international forum; the difference between the "therapeutic" approach to minorities after World War I and the "surgical" methods used after World War II; the Charter limitations on the competence of the United Nations even in regard to individual human rights (promotion, not protection); the relative value of spontaneous (constitutional) and imposed protection of minorities; the relative value of universal, continental, regional, and individualized systems of protection; the advantages and disadvantages of bilateral solutions by creating a triangle: the minority, its conational state, and the state to which it owes allegiance.

JACOB ROBINSON

*Mediation and Conciliation Within the United Nations* (in Greek). By Emmanuel J. Roucounas. (Athens: 1968. pp. 256.) It is fortunate that the Hellenic Institute of International and Foreign Law decided to publish this volume. Its purpose is not to expose the successes and failures of mediation and conciliation in the United Nations. The author's endeavor is to

examine the basic characteristics of these two methods as well as their development from the point of view of international law. However, he is aware that such a study involves not only law but also issues pertaining to international relations.

The First Part deals with general elements of these two means of harmonizing international conflicts and with their historical development. Particular emphasis is placed on their application by the League of Nations to various problems that had confronted it. There are three subdivisions in the Second Part of the work, which begins with a discussion of the relevant provisions of the Charter of the United Nations requiring its Members as well as the Organization itself to resort to peaceful solution of disputes. Special instances where the United Nations undertook such action are set forth in detail: Indonesia, Palestine, Kashmir and Cyprus. The rôle of the Secretary General of the United Nations in the maintenance of peace concludes the Second Part. In the Third Part, there is an analysis of the legal problems confronting the United Nations organs which have to deal with the methods of mediation and conciliation.

This timely and instructive work shows the author's high degree of scholarship. He furnishes a welcome insight into the legal and policy questions involved in the procedures examined in this study.

JOHN MAKTOŠ

*A Student's Guide to United Nations Documents and Their Use.* By John B. McConaughy and Hazel J. Blanks. (New York: Council on International Relations and United Nations Affairs, 1969. pp. viii, 17. \$.75.) The Council on International Relations and United Nations Affairs, the collegiate affiliate of the United Nations Association of the United States, has made a useful contribution to research in United Nations activities in the publication of *A Student's Guide to United Nations Documents and Their Use*. Considering the constant proliferation of matters in which the United Nations is involved, an intelligible directory to the reference sources of documents issued by its subordinate organs, committees and commissions is highly necessary.

It might be noted that the sources of publications of the specialized agencies of the United Nations are not included in the *Guide* for the apparent reason that those publications do not have a central index, bibliography or sales catalogue. The documents of the specialized agencies were included in the *United Nations Documents Index* from 1950 to 1962, but the listing was discontinued in 1963.<sup>1</sup>

This 17-page booklet, intended "to introduce the student to the best guides available at the present time," thoroughly fulfills its purpose, explaining document symbols and the United Nations numbering system and indicating indexes where documents of the specific body on particular subjects are listed. It also contains a valuable section indicating the steps to be followed by the beginning researcher. The pamphlet should prove most useful to students of international relations both in and out of college. It may be ordered from the Council on International Relations and United Nations Affairs at 833 United Nations Plaza, New York 10017.

ELEANOR H. FINCH

<sup>1</sup> Information regarding the publications of the specialized agencies is contained in the Report of the Society's Committee on Publications of the Department of State and the United Nations, printed in the Proceedings of the American Society of International Law, 1969, at p. 253.

## BOOKS RECEIVED \*

- Académie de Droit International. *Colloque 1968: Les Accords de Commerce International*. Prepared by G. Kojanec. Leiden: A. W. Sijthoff, 1969. pp. 374.
- . *Recueil des Cours, 1968*. Tome II (Vol. 124 of the Collection). Leiden: A. W. Sijthoff, 1969. pp. viii, 705. Indexes. Tables of cases.
- Bailey, Sydney D. *Voting in the Security Council*. (Indiana University International Studies.) Bloomington and London: Indiana University Press, 1970. pp. xii, 275. Index. \$10.00.
- Basak, Adam. *Decisions of the United Nations Organs in the Judgments and Opinions of the International Court of Justice*. (Travaux de la Société des Sciences et des Lettres de Wrocław, Series A, No. 138.) Wrocław: Wrocław Scientific Society, 1969. pp. 223. Zł. 45.
- Beltramo, Mario, Giovanni E. Longo, John H. Merryman (translators). *The Italian Civil Code*. Dobbs Ferry, N. Y.: Oceana Publications, 1969. pp. xii, 787. Index. \$35.00.
- Bernath, Stuart L. *Squall Across the Atlantic. American Civil War Prize Cases and Diplomacy*. Berkeley and Los Angeles: University of California Press, 1970. pp. x, 229. Index. \$6.50.
- Black, Charles L., Jr. *Perspectives in Constitutional Law*. With Revisions. Englewood Cliffs, N. J.: Prentice-Hall, Inc., 1970. pp. xii, 116. Index.
- Bleckmann, Albert. *Das Französische Kolonialrecht und die Gründung neuer Staaten. Die Rechtsentwicklung in Syrien/Libanon, Indochina und Schwarzafrika*. (Max-Planck-Institut für Ausländisches Öffentliches Recht und Völkerrecht. Beiträge, Vol. 50.) Cologne and Berlin: Carl Heymanns Verlag KG, 1969. pp. xvi, 514. DM. 68.
- Burghardt, Günter. *Die Eigentumsordnungen in den Mitgliedstaaten und der EWG-Vertrag. Zur Auslegung von Art. 222 EWGV*. (Universität Hamburg, Abhandlungen aus dem Seminar für Öffentliches Recht, Vol. 57.) Hamburg: Verlag Ludwig Appel & Sohn, 1969. pp. 114. DM. 18.50.
- Carey, John. *UN Protection of Civil and Political Rights*. (Procedural Aspects of International Law Series, Vol. 8.) Syracuse, N. Y.: Syracuse University Press, 1970. pp. xvi, 205. Index. \$7.50.
- Cassin, René. *Amicorum Discipulorumque Liber. Problèmes de Protection Internationale des Droits de l'Homme*. (International Institute of Human Rights. Jura Hominis ac Civis, Vol. I.) Paris: Editions A. Pecone, 1969. pp. lxvi, 482.
- Castañeda, Jorge. *Legal Effects of United Nations Resolutions*. Translated by Alba Amoia. (Columbia University Studies in International Organization, No. 6.) New York and London: Columbia University Press, 1970. pp. xii, 243. Index. \$10.00.
- Cornell Law School. *Human Rights. Protection of the Individual under International Law*. Proceedings of the Fifth Summer Conference on International Law, Ithaca, June 18-20, 1964. South Hackensack, N. J.: Fred B. Rothman & Co., 1970. pp. xiv, 286. \$8.50.
- Coste, René. *Théologie de la Liberté Religieuse. Liberté de Conscience—Liberté de Religion*. (Recherches et Synthèses de Sciences Religieuses. Section de Morale.) Gembloux: Editions J. Duculot, S.A., 1969. pp. xxviii, 514. Index.
- Cour de Justice des Communautés Européennes. *Bibliographie zur Europäischen Rechtsprechung*. Nachtraglieferung. Strasbourg: Service de Documentation, 1969. pp. lxvii, 477-627.
- Dainow, Joseph (ed.). *Essays on the Civil Law of Obligations*. Baton Rouge: Louisiana State University Press, 1969. pp. xii, 313. \$10.00.

\* Mention here neither assures nor precludes later review.

- De Visscher, Charles. *Problèmes de Confins en Droit International Public*. Paris: Éditions A. Pedone, 1969. pp. 200.
- Dölle, Hans, and Konrad Zweigert (eds.). *Rechtsprechungssammlung zum Europarecht*. II. *Ergänzungslieferung 1961/62*. Anleitung zum Einordnen der Ergänzungslieferungs- siehe Rückseite. Tübingen: J. C. B. Mohr (Paul Siebeck), 1970.
- Ebel, Robert E. *Communist Trade in Oil and Gas*. An Evaluation of the Future Export Capability of the Soviet Bloc. (Praeger Special Studies in International Economics and Development.) New York, Washington and London: Praeger Publishers, 1970. pp. xx, 447. \$20.00.
- Ehrenzweig, Albert A. *Specific Principles of Private Transnational Law*. (Reprinted from Hague Academy, Recueil des Cours, Vol. I., 1968.) Leiden: A. W. Sijthoff, 1969. pp. 165-370.
- FalI, Gundolf. *Der Grundsatz der Freiheit der Meere in der Staatenpraxis von 1493 bis 1648*. Eine rechtsgeschichtliche Untersuchung. (Max-Planck-Institut für Ausländisches Öffentliches Recht und Völkerrecht. Beiträge, Vol. 51.) Cologne, Berlin, Bonn, Munich: Carl Heymanns Verlag KG, 1969. pp. xii, 143. Bibliography. DM. 23.
- Falk, Richard A. *The Status of Law in International Society*. (Published for the Center of International Studies, Princeton University.) Princeton, N. J.: Princeton University Press, 1970. pp. xvi, 678. Index. \$15.00.
- Finkelstein, Lawrence S. (ed.) *The United States and International Organization. The Changing Setting*. Cambridge, Mass., and London: The M.I.T. Press, 1969. pp. viii, 216. Index.
- Fulja, Carl H., and Warren F. Schwartz. *Regulation of International Trade and Investment. Cases and Materials*. (University Casebook Series.) Mineola, N. Y.: The Foundation Press, 1970. pp. xlv, 796. Index.
- Gheballi, Victor-Yves. *La France en Guerre et les Organisations Internationales 1939-1945*. Paris and The Hague: Mouton, 1969. pp. xv, 273.
- Giuliano, Mario. *La Giurisdizione Civile Italiana e lo Straniero*. 2nd ed. enlarged, revised and brought up to date, with the collaboration of Prof. Fausto Pocar. Milan: Dott. A. Giuffrè, Editore, 1970. pp. xii, 332. Index. L. 4,000.
- Green, Andrew Wilson. *Political Integration by Jurisprudence. The Work of the Court of Justice of the European Communities in European Political Integration*. With a preface by Professor H. G. Schermers. Leiden: A. W. Sijthoff, 1969. pp. xxviii, 848. Index. Fl. 95.
- Hadley, Eleanor M. *Antitrust in Japan*. Princeton, N. J.: Princeton University Press, 1970. pp. xii, 528. Index. \$18.50.
- Herkin, Louis. *How Nations Behave. Law and Foreign Policy*. (Praeger University Series.) Published for the Council on Foreign Relations. New York, Washington and London: Praeger Publishers, 1970. pp. xii, 319. Index. \$3.50 (paperback).
- Higgins, Rosalyn. *United Nations Peacekeeping 1946-1967. Documents and Commentary*. Vol. II: *Asia*. (Issued under the auspices of the Royal Institute of International Affairs.) New York, London, Bombay, Karachi, Kuala Lumpur: Oxford University Press, 1970. pp. xviii, 486. Index. 90 s.; \$12.50.
- Hingorani, R. C. *The Indian Extradition Law*. New York: Asia Publishing House, 1970. pp. xii, 133. Index. \$6.00.
- Hofman, Gerhard. *Die Deutsche Teilung. Staats- und Völkerrechtliche Aspekte*. (Politik in unserer Zeit, Vol. 13.) Pfullingen: Verlag Gunther Neske, 1969. pp. 102. Index. DM. 6.80.
- Horsefield, J. Keith (ed.). *The International Monetary Fund 1945-1965. Twenty Years of International Monetary Cooperation*. 3 volumes. Vol. I: *Chronicle*. pp. xviii, 663. Indexes; Vol. II: *Analysis*. By Margaret G. de Vries and J. Keith Horsefield with the collaboration of Joseph Gold, Mary H. Gumbart, Gertrud Lovasy and Emil G. Spitzer. pp. xviii, 621. Indexes; Vol. III: *Documents*. pp. viii, 549. Washington, D. C.: International Monetary Fund, 1969. \$5.00 a volume; \$12.50 a set.



- Institut für Völkerrecht, Universität Göttingen. *Atomkernenergierecht. Göttinger Atomrechts Katalog 1969. Teil L. Laws and Regulations. Treaties.* Vol. 19: *Portugal-Spain*. Edited by Gottfried Zieger and Gertie Bauer. Göttingen: 1969. pp. xlv, 304.
- . *Kernenergierecht*, No. 14. *Italien* (2). (Schriftenreihe des Bundesministers für Wissenschaftliche Forschung.) Munich: Gersbach & Sohn Verlag, 1969. pp. 373.
- International Institute for the Unification of Private Law (Unidroit). *Digest of Legal Activities of International Organizations and Other Institutions.* (In French and English.) Dobbs Ferry, N. Y.: Oceana Publications, 1970. pp. iv, 566 (approx.) (loose-leaf, unnumbered). Index. \$30.00.
- Jan, George P. (ed.) *International Politics of Asia: Readings.* Belmont, Calif.: Wadsworth Publishing Co., 1969. pp. 381. Author index.
- Johnson, E. L. *An Introduction to the Soviet Legal System.* London: Methuen & Co., Ltd., 1969; New York: Barnes & Noble (distr. in U. S.), 1970. pp. xvi, 248. Index. 65 s.; \$10.50.
- Khol, Andreas. *Zwischen Staat und Weltstaat. Die Internationalen Sicherungsverfahren zum Schutze der Menschenrechte.* (Schriftenreihe der Österreichischen Gesellschaft für Aussenpolitik und Internationale Beziehungen.) Vienna and Stuttgart: Wilhelm Braumüller, Universitäts-Verlagsbuchhandlung Ges. M.B.H., 1970.
- Mayer, Milton. *On Liberty: Man v. The State.* A Center Occasional Paper, with a Center Discussion. Santa Barbara, Calif.: Center for the Study of Democratic Institutions, 1969. pp. 192. \$2.25.
- Mayrzedt, Hans, and Hans Christoph Binswanger (eds.). *Die Neutralen in der Europäischen Integration. Kontroversen—Konfrontationen—Alternativen.* (Schriftenreihe der Österreichischen Gesellschaft für Aussenpolitik und Internationale Beziehungen, Vol. 5.) Vienna and Stuttgart: Wilhelm Braumüller, Universitäts-Verlagsbuchhandlung Ges. M.B.H., 1970. pp. xvi, 496. Index. \$16.00.
- Max-Planck-Institut für Ausländisches Öffentliches Recht und Völkerrecht. *Judicial Protection against the Executive* (In French, German or English.) 3 volumes. Vols. 1, 2: *National Reports. Australia-Yugoslavia.* pp. xlv, 634; xii, 635-1258. Cologne, Berlin, Bonn and Munich: Carl Heymanns Verlag KG, 1969, 1970; Dobbs Ferry, N. Y.: Oceana Publications. \$20.00 each; \$50.00 for 3-vol. set.
- McWhinney, Edward. *Conflit Idéologique et Ordre Public Mondial.* Paris: Éditions A. Pedone, 1970. pp. 157.
- Meyer, Richard H. *Bankers' Diplomacy. Monetary Stabilization in the Twenties.* (Columbia Studies in Economics, No. 4.) New York and London: Columbia University Press, 1970. pp. xiv, 170. Index. \$8.00.
- Nascimento e Silva, G. E. do. *Diplomacia e Protocolo.* Rio de Janeiro: Gráfica Record Editôra, 1969. pp. 298. Bibliography.
- Olson, Kent R. *Enkla Bolag and Partnerships.* A Comparison of the Statutory Basis of Partnership Law in Sweden and the United States. Stockholm: Almqvist & Wiksell, 1969. pp. 137. Index of cases.
- Parry, Clive (ed.). *The Consolidated Treaty Series.* Vols. 1-5. Vol. 1: pp. lv, 468; Vol. 2: pp. x, 518; Vol. 3: pp. vii, 514; Vol. 4: pp. viii, 520; Vol. 5: pp. viii, 507. Dobbs Ferry, N. Y.: Oceana Publications, 1969. \$40.00 a volume.
- Pelzer, Norbert. *Rechtsprobleme der Beseitigung radioaktiver Abfälle in das Meer. Eine Völkerrechtliche und Rechtsvergleichende Untersuchung.* (Institut für Völkerrecht, Universität Göttingen, Studien zum Internationalen Wirtschaftsrecht und Atomenergierecht, Vol. 41.) Göttingen: 1970. pp. xlv, 216. Index. DM. 33.
- Rolfe, Sidney E., and Walter Damm (eds.). *The Multinational Corporation in the World Economy. Direct Investment in Perspective.* (Praeger Special Studies in International Economics and Development.) New York, Washington and London: Praeger Publishers, 1970. pp. xxx, 167. \$10.00.
- Rosenbaum, Naomi (ed.). *Readings on the International Political System.* (Foundations of Modern Political Science Series.) Englewood Cliffs, N. J.: Prentice-Hall, Inc., 1970. pp. vi, 442. \$4.95.

- Rostow, Eugene V. *Law, Power, and the Pursuit of Peace*. Lincoln, Neb.: University of Nebraska Press, 1968. pp. 125. Index. \$5.00.
- Rubinstein, Alvin Z. *Yugoslavia and the Nonaligned World*. Princeton, N. J.: Princeton University Press, 1970. pp. xvi, 354. Index. \$11.00.
- Ruppert, Andreas. *Die Integrationsgewalt. Eine Staatstheoretische und Verfassungsrechtliche Studie zu Artikel 24 Absatz 1 des Grundgesetzes*. (Universität Hamburg, Abhandlungen aus dem Seminar für Öffentliches Recht, Vol. 58.) Hamburg: Verlag Ludwig Appel & Sohn, 1969. pp. 341. DM. 42.
- Scheuermann, Thomas. *Statutenwechsel im Internationalen Erbrecht*. (University of Munich School of Law, No. 10.) Munich: C. H. Beck'sche Verlagsbuchhandlung, 1969. pp. xx, 164. Index. DM. 22.50.
- Singh, Nagendra. *The Legal Regime of Merchant Shipping*. (Kashinath Trimbak Telang Endowment Lectures.) Bombay: Superintendent, Publications Section, University of Bombay, 1969. pp. xxvi, 320. Rs. 25.
- Torrelli, Maurice. *L'Individu et le Droit de la Communauté Economique Européenne*. Montreal: Les Presses de l'Université de Montréal, 1970. pp. xii, 396. Index. \$9.50.
- United States Department of State. *American Foreign Policy. Current Documents, 1967*. (Department of State Pub. No. 8495.) Washington, D. C.: U. S. Govt. Printing Office, 1969. pp. lvi, 1324. Index. \$6.75.
- Van Dyke, Vernon. *Human Rights, the United States, and World Community*. New York, London and Toronto: Oxford University Press, 1970. pp. x, 292. Index.
- Veit, Theodor (ed.). *System eines Internationalen Volksgruppenrechts. Part 1: Grundlagen und Begriffe*. (Ausschuss für Politik und Völkerrecht. Völkerrechtliche Abhandlungen, Vol. 3.) Vienna and Stuttgart: Wilhelm Braumüller Universitäts-Verlagsbuchhandlung Ges.M.B.H., 1970. pp. viii, 193. Index. \$11.00.
- Winkler, Günther. *Wertbetrachtung im Recht und ihre Grenzen*. (Forschungen aus Staat und Recht, No. 12.) Vienna and New York: Springer-Verlag, 1969. pp. viii, 60. Index. \$69; DM. 11; \$2.75.
- Wise, Raymond L. *Order Please. A Plea and a Plan for World Order*. Brooklyn, N. Y.: Central Book Co., 1970. pp. xxii, 309.
- Zacher, Mark W. *Dag Hammarskjöld's United Nations*. (Columbia University Studies in International Organization, No. 7.) New York and London: Columbia University Press, 1970. pp. xiv, 295. Index. \$7.00.

# OFFICIAL DOCUMENTS

## UNITED NATIONS

### REPORT OF THE INTERNATIONAL LAW COMMISSION

ON THE WORK OF ITS TWENTY-FIRST SESSION, JUNE 2–AUGUST 8, 1969 \*

[page 1]

#### CHAPTER I

##### ORGANIZATION OF THE SESSION

1. The International Law Commission, established in pursuance of General Assembly resolution 174 (II) of 21 November 1947, in accordance with its Statute annexed thereto, as subsequently amended, held its twenty-first session at the United Nations Office at Geneva from 2 June to 8 August 1969. The work of the Commission during this session is described in the present report. Chapter II of the report, on relations between states and international organizations, contains a description of the Commission's work on that topic, together with twenty-nine additional draft articles on representatives of states to international organizations, consisting of provisions on permanent missions to international organizations, and commentaries thereon. Chapter III, on succession of states and governments, contains an account of the historical background of the whole topic and a description of the Commission's work on one of the headings of the topic, namely succession in respect of matters other than treaties. Chapters IV and V relate to the progress of the Commission's work on state responsibility and the most-favoured nation clause, respectively. Chapter VI deals with the organization of the Commission's future work and a number of administrative and other questions.

##### A. Membership

2. The Commission consists of the following members:

Mr. Robert Ago (Italy);

\* U. N. General Assembly, 24th Sess., Official Records, Supp. No. 10 (A/7610/ Rev. 1). For reports of the International Law Commission covering its previous sessions, see Supplements to this JOURNAL, Vol. 44 (1950), pp. 1, 105; Vol. 45 (1951), p. 103; Vol. 47 (1953), p. 1; Vol. 48 (1954), p. 1; Vol. 49 (1955), p. 1; and Official Documents, Vol. 50 (1956), p. 190; Vol. 51 (1957), p. 154; Vol. 52 (1958), p. 177; Vol. 53 (1959), p. 230; Vol. 54 (1960), p. 229; Vol. 55 (1961), p. 223; Vol. 56 (1962), p. 286; Vol. 57 (1963), p. 190; Vol. 58 (1964), p. 241; Vol. 59 (1965), pp. 203, 434; Vol. 60 (1966), p. 155; Vol. 61 (1967), p. 248; Vol. 62 (1968), p. 244; and 8 Int. Legal Materials 144 (1969).

For convenience of reference to the Report, the page numbers of the U. N. document containing the Report are inserted in italics in brackets at the beginning of each page of the original document as here printed.

Mr. Fernando ALBÓNICO (Chile);  
Mr. Gilberto AMADO (Brazil);  
Mr. Milan BARTOŠ (Yugoslavia);  
Mr. Mohammed BEDJAOU (Algeria);  
Mr. Jorge CASTAÑEDA (Mexico);  
Mr. Erik CASTRÉN (Finland);  
Mr. Abdullah EL-ERIAN (United Arab Republic);  
Mr. Taslim O. ELIAS (Nigeria);  
Mr. Constantin Th. EUSTATHIADES (Greece);  
Mr. Louis IGNACIO-PINTO (Dahomey);  
Mr. Eduardo JIMÉNEZ DE ARÉCHAGA (Uruguay);  
Mr. Richard D. KEARNEY (United States of America);  
Mr. NAGENDRA SINGH (India);  
Mr. Alfred RAMANGASOAVINA (Madagascar);  
Mr. Paul REUTER (France);  
Mr. Shabtai ROSENNE (Israel);  
Mr. José María RUDA (Argentina);  
Mr. Abdul Hakim TABIBI (Afghanistan);  
Mr. Arnold J. P. TAMMES (Netherlands);  
Mr. Senjin TSURUOKA (Japan);  
Mr. Nikolai USHAKOV (Union of Soviet Socialist Republics);  
Mr. Endre USTOR (Hungary);  
Sir Humphrey WALDOCK (United Kingdom of Great Britain and Northern Ireland);  
Mr. Mustafa Kamil YASSEEN (Iraq).

#### B. Officers

3. At its 990th meeting, held on 2 June 1969, the Commission elected the following officers:

*Chairman:* Mr. Nikolai Ushakov;  
*First Vice-Chairman:* Mr. Jorge Castañeda;  
*Second Vice-Chairman:* Mr. Nagendra Singh;  
*Rapporteur:* Mr. Constantin Th. Eustathiades.

#### C. Drafting Committee

4. At its 1007th meeting, held on 24 June 1969, the Commission appointed a Drafting Committee composed as follows:

*Chairman:* Mr. Jorge Castañeda;  
*Members:* Mr. Roberto Ago; Mr. Milan Bartoš; Mr. Louis Ignacio-Pinto; Mr. Eduardo Jiménez de Aréchaga; Mr. Paul Reuter; Mr. Abdul Hakim Tabibi; Mr. Arnold J. P. Tammes; Mr. Senjin Tsuruoka; Mr. Endre Ustor and Sir Humphrey Waldock. Mr. Fernando Albónico and Mr. Richard D. Kearney took part in the Committee's work in the absence of Mr. Eduardo Jiménez de Aréchaga and Sir Humphrey Waldock, respectively. Mr. Constantin Th. Eustathiades also took part in the Committee's work in his capacity as Rapporteur of the Commission.

### D. Secretariat

5. Mr. Constantin A. Stavropoulos, Legal Counsel, attended the 990th to 999th meetings held from 2 to 13 June 1969, and represented the Secretary-General on those occasions. Mr. Anatoly P. Movchan, Director of the Codification Division of the Office of Legal Affairs, represented the Secretary-General at the other meetings of the session, and acted as Secretary to the Commission. Mr. Nicolas Teslenko acted as Deputy Secretary to the Commission. Mr. Santiago Torres-Bernárdez and Mr. Eduardo Valencia-Ospina served as Assistant Secretaries.

[page 2]

### E. Agenda

6. The Commission adopted an agenda for the twenty-first session, consisting of the following items:

1. Relations between states and international organizations.
2. Succession of states and governments:
  - (a) Succession in respect of treaties;
  - (b) Succession in respect of matters other than treaties.
3. State responsibility.
4. Most-favoured-nation clause.
5. Co-operation with other bodies.
6. Organization of future work.
7. Dates and places of the Commission's meetings in 1970.
8. Other business.

7. In the course of the session, the Commission held fifty-two public meetings (990th to 1041st meetings) and four private meetings (on 21, 24, 29 and 31 July 1969, respectively). In addition, the Drafting Committee held ten meetings. The Commission considered all the items on its agenda with the exception of sub-item 2 (a) (Succession in respect of treaties).

8. The Commission received from the Secretary-General a letter entitled "Tribute to the International Law Commission" (A/CN.4/219), dated 3 June 1969 and addressed to the Chairman of the Commission, transmitting the text of a resolution adopted unanimously by the United Nations Conference on the Law of Treaties at its thirty-sixth plenary meeting, on 22 May 1969, entitled "Tribute to the International Law Commission."

## CHAPTER II

### RELATIONS BETWEEN STATES AND INTERNATIONAL ORGANIZATIONS

#### A. Introduction

##### I. SUMMARY OF THE COMMISSION'S PROCEEDINGS<sup>1</sup>

9. At its 986th meeting, on 31 July 1963, the Commission adopted a provisional draft of twenty-one articles on representatives of states to inter-

<sup>1</sup> An account of the historical background of the topic is contained in the report of the International Law Commission on the work of its twentieth session (Official Records of the General Assembly, Twenty-third Session, Supplement No. 9) (A/7209/Rev.1), pars. 9-20; Yearbook of the International Law Commission, 1968, Vol. II. [For text of the Report see also 8 Int. Legal Materials 144 (1969). Draft Arts. 1-21 appear at pp. 151-168 thereof.—Ed.]

national organizations, with the Commission's commentary on each article.<sup>2</sup> The first five articles form part I (General provisions), covering: use of terms, scope of the articles, their relationship with the relevant rules of international organizations and with other existing international agreements and derogation from the articles. The remaining articles make up section 1 of part II (Permanent missions to international organizations). This section is entitled "Permanent missions in general." It regulates the following questions: establishment of permanent missions; functions of a permanent mission; accreditation to two or more international organizations or assignment to two or more permanent missions; accreditation, assignment or appointment of a member of a permanent mission to other functions; appointment of the members of the permanent mission and their nationality; credentials of the permanent representative; his accreditation to organs of the organization and his full powers to represent the state in the conclusion of treaties; composition of the permanent mission and its size; notifications; *chargés d'affaires ad interim*; precedence; offices of permanent missions and the use of the flag and emblem.

10. In accordance with Articles 16 and 21 of its Statute, the Commission decided to transmit the provisional draft of twenty-one articles, through the Secretary-General, to governments for their observations.<sup>3</sup>

11. At the present session of the Commission, the Special Rapporteur, Mr. Abdullah El-Erian, submitted a fourth report (A/CN.4/218 and Add.1) containing a revised set of draft articles, with commentaries, on representatives of states to international organizations. Those draft articles covered the following subjects: facilities, privileges and immunities of permanent missions to international organizations; conduct of the permanent mission and its members; and end of the functions of the Permanent representative (sections 2, 3 and 4 of part II). The Special Rapporteur also submitted a working paper (A/CN.4/L.136) containing draft articles on permanent observers of non-members to international organizations.

12. The fourth report also included a summary of the discussion which had taken place in the Sixth Committee during the twenty-third session of the General Assembly on the "Report of the International Law Commission on the Work of its Twentieth Session" (agenda item 84)<sup>4</sup> and on the "Draft Convention on Special Missions" (agenda item 85),<sup>5</sup> since those discussions had touched on certain questions which may present some interest as regards representatives of states to international organizations and conferences.

## 2. THE SCOPE OF THE PRESENT GROUP OF DRAFT ARTICLES

13. The Commission considered the fourth report of the Special Rapporteur from its 991st to its 999th [page 3] meetings and referred the draft articles contained therein to the Drafting Committee. From its 1014th to its

<sup>2</sup> *Ibid.*, par. 21.

<sup>3</sup> *Ibid.*, par. 22.

<sup>4</sup> Official Records of the General Assembly, Twenty-third Session, Sixth Committee, 1029th to 1039th meetings.

<sup>5</sup> *Ibid.*, 1039th to 1059th, 1061st to 1072nd and 1087th to 1090th meetings.

1035th meetings the Commission considered the reports of the Drafting Committee. The Commission adopted a provisional draft of twenty-nine articles on the subjects included in sections 2 (Facilities, privileges, and immunities), 3 (Conduct of the permanent mission and its members) and 4 (End of functions) of part II (Permanent missions to international organizations). The provisional draft of the twenty-nine articles is reproduced below in the present chapter, together with commentaries. For the sake of convenience, the articles of the present group are numbered consecutively after the last article of the previous group. Accordingly, the first article of the present group is numbered 22.

14. The present group of draft articles has been arranged in three sections covering: (a) facilities, privileges and immunities of permanent missions to international organizations; (b) conduct of the permanent mission and its members, and (c) end of functions. The explanations of the terms used contained in Article 1 of part I are also applicable to part II. At the same time, as is pointed out in paragraph (4) of the commentary on Article 25, it was found necessary to add a further explanation, for the purposes of this part, of the term the "premises of the permanent mission." The explanation constitutes a new sub-paragraph of Article 1, designated provisionally as (k bis), the text of which will be found in the commentary on Article 25. Furthermore, during the discussion of this article, the question was raised whether the person charged by the sending state with the duty of acting as the head of the permanent mission should be referred to as "the permanent representative," as laid down in sub-paragraph (e) of Article 1. As is indicated below in paragraph (5) of the commentary on Article 25, the Commission decided to examine, at the second reading of Article 1, the use of the term "permanent representative" in sub-paragraph (e) of that article.

15. In preparing these draft articles, the Commission has sought to codify the modern rules of international law concerning permanent representatives to international organizations, and the articles formulated by the Commission contain elements of progressive development as well as of codification of the law.

16. In accordance with Articles 16 and 21 of its Statute, the Commission decided to transmit the present group of draft articles, through the Secretary-General, to governments for their observations. It also decided to transmit it, together with the previous group, to the Secretariats of the United Nations, the Specialized Agencies and the International Atomic Energy Agency (IAEA), for their observations. Bearing in mind the position of Switzerland as the host state in relation to the Office of the United Nations at Geneva and to a number of Specialized Agencies, as well as the wish expressed by the government of that country, the Commission deemed it useful to transmit also both groups of draft articles to that government for its observations.

17. At this session, the Commission again considered the question referred to in paragraph 28 of its report on the work of its twentieth session. At its 992nd meeting, it reached the conclusion that its draft should also

include articles dealing with permanent observers for non-member states to international organizations and with delegations to sessions of organs of international organizations. Opinions were divided on whether the draft should, in addition, include articles on delegations to conferences convened by international organizations or whether that question ought to be considered in connexion with another topic. At its 993rd meeting, the Commission took a provisional decision on the subject, leaving the final decision to be taken at a later stage. The Commission intends to consider at its twenty-second session draft articles on permanent observers for non-member states and on delegations to sessions of organs of international organizations and to conferences convened by such organizations.

18. The Commission also briefly considered the desirability of dealing, in separate articles, with the possible effects of exceptional situations—such as absence of recognition, absence or severance of diplomatic relations or armed conflict—on the representation of states in international organizations. In view of the delicate and complex nature of those questions, the Commission decided to resume their examination at a future session and to postpone any decision on them for the time being.

19. The text of Articles 22 to 50 with commentaries, as adopted by the Commission at the present session on the proposal of the Special Rapporteur, is reproduced below.

## **B. Draft articles on Representatives of States to International Organizations**

### **Part II. PERMANENT MISSIONS TO INTERNATIONAL ORGANIZATIONS (CONTINUED)**

#### **SECTION 2. FACILITIES, PRIVILEGES AND IMMUNITIES**

##### **GENERAL COMMENTS**

(1) As a general rule, the headquarters agreements of international organizations, whether universal or regional, include provisions for the enjoyment by permanent representatives of foreign states of privileges and immunities which the host state "accords to diplomatic envoys accredited to it." Usually, these headquarters agreements do not contain restrictions on the privileges and immunities of permanent representatives which are based on the application of the principle of reciprocity in the relations between the host state and the sending state. However, the relevant articles of some of the headquarters agreements include a proviso which makes it an obligation of the host state to concede to permanent representatives the privileges and immunities which it accords to diplomatic envoys accredited to it, "subject to corresponding conditions and obligations." Examples are provided by: Article V, section 15, of the Headquarters Agreement of the United Nations;<sup>6</sup> Article XI, [page 4] section 24, paragraph (a), of the Headquarters Agreement of the Food and Agriculture Organization of the

<sup>6</sup> United Nations, Treaty Series, Vol. 11, p. 12.



United Nations (FAO);<sup>7</sup> Article I of the Headquarters Agreement of the Organization of American States (OAS).<sup>8</sup>

(2) In determining the rationale of diplomatic privileges and immunities the International Law Commission discussed, at its tenth session in 1958, the theories which have exercised influence on the development of diplomatic privileges and immunities. The Commission mentioned the "extritoriality" theory, according to which the premises of the mission represent a sort of extension of the territory of the sending state; and the "representative character" theory, which bases such privileges and immunities on the idea that the diplomatic mission personifies the sending state. The Commission pointed out that "there is now a third theory which appears to be gaining ground in modern times, namely, the 'functional necessity' theory, which justifies privileges and immunities as being necessary to enable the mission to perform its functions."<sup>9</sup>

(3) Functional necessity is one of the bases of the privileges and immunities of representatives of states to international organizations. In accordance with Article 105, paragraph 2, of the Charter of the United Nations, "Representatives of the Members of the United Nations and officials of the Organization shall . . . enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connection with the Organization."

(4) The representation of states in international organizations is the basic function of permanent missions as defined in Article 7 of the twenty-one provisional articles adopted by the Commission at its twentieth session. Article 1, sub-paragraph (d), of these articles, defines a "permanent mission" as "a mission of representative and permanent character sent by a State member of an international organization to the Organization." Paragraph (2) of the commentary on Article 7 states that:

"Sub-paragraph (a) is devoted to the representational function of the permanent mission. It provides that the mission represents the sending State in the Organization. The mission, and in particular the permanent representative as head of the mission, is responsible for the maintenance of official relationships between the Government of the sending State and the Organization."<sup>10</sup>

(5) The representation of states within the framework of the diplomacy of international organizations and conferences has its particular characteristics. The representative of a state to an international organization is not the representative of his state to the host state as is the case of the diplomat

<sup>7</sup> United Nations Legislative Series, Legislative texts and treaty provisions concerning the legal status, privileges and immunities of international organizations, Vol. II (ST/LEG/SER.B/11), p. 187.

<sup>8</sup> United Nations, Treaty Series, Vol. 181, p. 148.

<sup>9</sup> Official Records of the General Assembly, Thirteenth Session, Supplement No. 9 (A/3859); Yearbook of the International Law Commission, 1958, Vol. II, pp. 94 and 95.

<sup>10</sup> Official Records of the General Assembly, Twenty-third Session, Supplement No. 9 (A/7209/Rev.1), pp. 8 and 9; Yearbook of the International Law Commission, 1968, Vol. II.

accredited to the state. In the latter case, the diplomatic agent is accredited to the receiving state in order to perform certain functions of representation and negotiation between it and his own state. The representative of a state to an international organization represents his state before the organization.

#### *Article 22. General facilities*

The host state shall accord to the permanent mission full facilities for the performance of its functions. The Organization shall assist the permanent mission in obtaining those facilities and shall accord to the mission such facilities as lie within its own competence.

#### *Commentary*

(1) The first sentence of Article 22 is based on Article 25 of the Vienna Convention on Diplomatic Relations.<sup>11</sup>

(2) During the discussion in the Commission some doubt was expressed whether it was desirable that the obligations of international organizations should be stated in the draft articles inasmuch as this would raise the general question whether it was intended that the organizations themselves should become parties to the draft articles. However, it was pointed out by several members that the Commission was trying to state what was the general international law concerning permanent missions to international organizations. The question whether international organizations would become parties to the draft articles was a separate one to be considered at a later stage.

(3) The words "as lie within its own competence" at the end of the second sentence of Article 22 are designed to emphasize both that the facilities which an organization is able to grant are limited and that the granting of facilities to a permanent mission by an organization is subject to the relevant rules of the organization, in particular those concerning budgetary and administrative matters.

#### *Article 23. Accommodation of the permanent mission and its members*

1. The host state shall either facilitate the acquisition on its territory, in accordance with its laws, by the sending state of premises necessary for its permanent mission or assist the latter in obtaining accommodation in some other way.

2. The host state and the Organization shall also, where necessary, assist permanent missions in obtaining suitable accommodation for their members.

#### *Commentary*

(1) Article 23 is based on Article 21 of the Vienna Convention on Diplomatic Relations. As indicated by [page 5] the International Law Commission in the commentary on the relevant provision (Art. 19) of its draft

<sup>11</sup> United Nations, Treaty Series, Vol. 500, p. 96.

articles on diplomatic intercourse and immunities,<sup>12</sup> which served as the basis for the Vienna Convention, the laws and regulations of a given country may make it impossible for a mission to acquire the premises necessary for it. For that reason the Commission inserted in Article 23 a rule which makes it obligatory for the receiving state to ensure the provision of accommodation for the mission if the latter is not permitted to acquire it. These considerations equally underlie paragraph 1 of the present article.

(2) Certain members of the Commission pointed out during the discussion of the article that in some cases property rights over the premises of a permanent mission could not be obtained by acquisition under the applicable municipal law and that in other cases the premises were acquired not by the sending state but, on its behalf, by the permanent representative. They believed therefore that the expressions "acquisition" and "by the sending state" unduly restricted the scope of Article 23. It was, however, observed that both series of cases would come under the clause of Article 23 obliging the host state to assist the sending state "in obtaining accommodation in some other way." The Commission decided, therefore, to retain in the article the expressions in question.

(3) The assistance which the Organization may give to the members of the mission in obtaining suitable accommodation under paragraph 2 would be very useful, among other reasons, because the Organization itself would have a vast experience of the real estate market and the conditions governing it.

*Article 24. Assistance by the Organization in respect  
of privileges and immunities*

The Organization shall, where necessary, assist the sending state, its permanent mission and the members of the permanent mission in securing the enjoyment of the privileges and immunities provided for by the present articles.

*Commentary*

One of the characteristics of representation to international organizations springs from the fact that the observance of juridical rules governing privileges and immunities is not solely the concern of the sending state as in the case of bilateral diplomacy. In the discussion of the "Question of diplomatic privileges and immunities" (agenda item 98) which took place in the Sixth Committee during the twenty-second session of the General Assembly, it was generally agreed that the United Nations itself had an interest in the enjoyment by the representatives of Member States of the privileges and immunities necessary to enable them to carry out their tasks. It was also recognized that the Secretary-General should maintain his efforts to ensure that the privileges and immunities concerned were re-

<sup>12</sup> Official Records of the General Assembly, Thirteenth Session, Supplement No. 9 (A/3859); Yearbook of the International Law Commission, 1958, Vol. II, p. 95.

spected.<sup>13</sup> In his statement at the 1016th meeting of the Sixth Committee the Legal Counsel, speaking as the representative of the Secretary-General, stated that:

" . . . the rights of representatives should properly be protected by the Organization and not left entirely to bilateral action of the States immediately involved. The Secretary-General would therefore continue to feel obligated in the future, as he has done in the past, to assert the rights and interests of the Organization on behalf of representatives of Members as the occasion may arise. I would not understand from the discussion in this Committee that the Members of the Organization would wish him to act in any way different from that which I have just indicated. Likewise, since the Organization itself has an interest in protecting the rights of representatives, a difference with respect to such rights may arise between the United Nations and a Member and consequently be the subject of a request for an advisory opinion under section 30 of the Convention (the Convention on the Privileges and Immunities of the United Nations of 1946). It is thus clear that the United Nations may be one of the 'parties' as that term is used in section 30."<sup>14</sup>

*Article 25. Inviolability of the premises of the permanent mission*

1. The premises of the permanent mission shall be inviolable. The agents of the host state may not enter them, except with the consent of the permanent representative. Such consent may be assumed in case of fire or other disaster that seriously endangers public safety, and only in the event that it has not been possible to obtain the express consent of the permanent representative.

2. The host state is under a special duty to take all appropriate steps to protect the premises of the permanent mission against any intrusion or damage and to prevent any disturbance of the peace of the permanent mission or impairment of its dignity.

3. The premises of the permanent mission, their furnishings and other property thereon and the means of transport of the permanent mission shall be immune from search, requisition, attachment or execution.

*Commentary*

(1) The requirement that the host state should ensure the inviolability of permanent missions' premises, archives and documents has been generally recognized in practice. In a letter sent to the Legal Adviser of one of the specialized agencies in 1964, the Legal Counsel of the United Nations stated that:

"There is no specific reference to mission premises in the Headquarters Agreement and the diplomatic status of these premises therefore arises

<sup>13</sup> Official Records of the General Assembly, Twenty-second Session, Annexes, agenda item 98, document A/6965, par. 14.

<sup>14</sup> *Ibid.*, document A/C.6/385, par. 8.

from the diplomatic status of a resident representative and his staff.”<sup>15</sup>

[page 6] (2) The headquarters agreements of some of the specialized agencies contain provisions relating to the inviolability of the premises of permanent missions. An example of such provision may be found in Article XI of the Headquarters Agreement of FAO.

(3) The inviolability of the premises of the United Nations and the specialized agencies was sanctioned in Article II, section 3, of the Convention on the Privileges and Immunities of the United Nations and Article III, section 5, of the Convention on the Privileges and Immunities of the Specialized Agencies<sup>16</sup> respectively. These provisions state that the property and assets of the United Nations and the specialized agencies, wherever located and by whomsoever held, shall be immune from search, requisition, confiscation, expropriation and any other form of interference, whether by executive, administrative, judicial or legislative action.

(4) As a result of its consideration of Article 25 the Commission decided to insert in Article 1 (Use of terms) adopted at its twentieth session<sup>17</sup> a new paragraph designated provisionally as (*k bis*) relating to the term “the premises of the permanent mission.” The new paragraph (*k bis*), which is based on paragraph (*i*) of Article 1 of the Vienna Convention on Diplomatic Relations reads as follows:

“(k bis) The ‘premises of the permanent mission’ are the buildings or parts of buildings and the land ancillary thereto, irrespective of ownership, used for the purposes of the permanent mission, including the residence of the permanent representative.”

(5) During the discussion in the Commission some members pointed out that it would be preferable to refer to the person in charge of the mission as “head of the mission” since the permanent representative was not always the head of the permanent mission and several members of the permanent mission might be permanent representatives to different organizations. Further, the permanent mission’s premises could be located within the premises occupied by the diplomatic mission of the sending state or possibly by a consular mission. The question would then arise as to which representative of the sending state was responsible for the premises concerned. Considering that the term “permanent representative” was the one used in the twenty-one articles provisionally adopted at its previous session, the Commission decided for the sake of harmony between those articles and the present group of articles to conform to the terminology already

<sup>15</sup> “The practice of the United Nations, the specialized agencies and the International Atomic Energy [Agency] concerning their status, privileges and immunities: study prepared by the Secretariat” (hereinafter referred to as “Study of the Secretariat”), Yearbook of the International Law Commission, 1967, Vol. II, documents A/CN.4/L.118 and Add.1 and 2, p. 187, par. 154.

<sup>16</sup> United Nations, Treaty Series, Vol. 33, p. 262.

<sup>17</sup> Official Records of the General Assembly, Twenty-third Session, Supplement No. 9 (A/7209/Rev.1), pp. 4 and 5; Yearbook of the International Law Commission, 1968, Vol. II.

used. Further consideration will be given, however, to this question when the Commission undertakes the second reading of the draft articles. The Commission intends to examine again the use of the term "permanent representative" as defined in sub-paragraph (e) of Article 1.

(6) The third sentence of paragraph 1 reproduces part of the text of the amendment submitted by Argentina to Article 25 of the draft articles on special missions and adopted at the 1088th meeting of the Sixth Committee during the latter's consideration of the item entitled "Draft Convention on Special Missions" at the twenty-third session of the General Assembly.<sup>18</sup>

*Article 26. Exemption of the premises of the permanent mission from taxation*

1. The sending state, the permanent representative or another member of the permanent mission acting on behalf of the mission shall be exempt from all national, regional or municipal dues and taxes in respect of the premises of the permanent mission, whether owned or leased, other than such as represent payment for specific services rendered.

2. The exemption from taxation referred to in this article shall not apply to such dues and taxes payable under the law of the host state by persons contracting with the sending state, the permanent representative or another member of the permanent mission acting on behalf of the mission.

*Commentary*

(1) Article 26 is based on Article 23 of the Vienna Convention on Diplomatic Relations, with the addition in paragraphs 1 and 2 of the expression "or another member of the permanent mission acting on behalf of the mission," which appears in Article 24 of the draft articles on special missions.

(2) The replies of the United Nations and the specialized agencies indicate that the exemption provided for in this article is generally recognized. Examples of provisions of headquarters agreements for such exemption are to be found in Article XI of the Headquarters Agreement of FAO and in Articles XII and XIII of the Headquarters Agreement of IAEA.<sup>19</sup>

(3) During the discussion of Article 26 the attention of the Commission was drawn to the inequality resulting from the provisions of paragraph 2 as between a state that was able to buy property to house its mission, or the mission staff, and a state which found itself obliged to lease premises for the same purpose. It was pointed out that although the paragraph was based on the corresponding provisions of the 1961 Vienna Convention on Diplomatic Relations and the 1963 Vienna Convention on Consular Relations<sup>20</sup> and broadly reflected existing practice, the inequality in question did not represent a universal practice. Thus in the case of IAEA, no taxes are imposed by the host state on the premises used by missions or delegates, including rented premises and parts of buildings. It was suggested that the

<sup>18</sup> Official Records of the General Assembly, Twenty-third Session, Annexes, agenda item 85, document A/7375, pars. 190, 192, 194 and 195.

<sup>19</sup> United Nations, Treaty Series, Vol. 339, p. 152.

<sup>20</sup> *Ibid.*, Vol. 596, p. 262.

Commission should examine the problem in order to ascertain [page 7] whether it was possible to incorporate in Article 26 an element of progressive development for the purpose of eliminating that unsatisfactory inequality. It was also pointed out in the discussion that it would be desirable to ascertain whether a certain practice regarding refunds or rebates of taxes on leased premises was general. The Commission intends to examine these matters again at the second reading of the draft articles in the light of the information which the Special Rapporteur would elicit from the specialized agencies and the views of governments.

***Article 27. Inviolability of archives and documents***

The archives and documents of the permanent mission shall be inviolable at any time and wherever they may be.

*Commentary*

(1) Article 27 is based on Article 24 of the Vienna Convention on Diplomatic Relations.

(2) In paragraph 3 of its commentary on Article 22 (Inviolability of the archives) of its draft articles on diplomatic intercourse and immunities adopted in 1958, the International Law Commission stated:

"Although the inviolability of the mission's archives and documents is at least partly covered by the inviolability of the mission's premises and property, a special provision is desirable because of the importance of the inviolability to the functions of the mission. This inviolability is connected with the protection accorded by article 25 to the correspondence and communications of the mission."<sup>21</sup>

***Article 28. Freedom of movement***

Subject to its laws and regulations concerning zones entry into which is prohibited or regulated for reasons of national security, the host state shall ensure freedom of movement and travel in its territory to all members of the permanent mission and members of their families forming part of their respective households.

*Commentary*

(1) This article is based on Article 26 of the Vienna Convention on Diplomatic Relations.

(2) The only difference of substance between the two provisions is the addition in Article 28 of the phrase "and members of their families forming part of their respective households." The Commission considered that the families of members of the permanent mission should have the right to travel freely in the host state. The Commission agreed that the present liberal practice with regard to the members of the families of diplomatic agents could be regarded as an expression of a customary rule but that it was

<sup>21</sup> Official Records of the General Assembly, Thirteenth Session, Supplement No. 9 (A/3859); Yearbook of the International Law Commission, 1958, Vol. II, p. 96.

preferable to insert a specific provision to that effect in the present draft articles in view, in particular, of the lack of reciprocity in multilateral diplomacy.

(3) Replies of the specialized agencies indicate that no restrictions have been imposed by the host state on the movement of members of permanent missions.

(4) During the discussion in the Commission some members raised the question whether the proper functioning of permanent missions to international organizations required that their members enjoy the same freedom of movement that was granted to members of diplomatic missions. They suggested that the freedom of movement guaranteed in Article 28 should be qualified in the same manner as in the corresponding article (Art. 27) of the draft articles on special missions.<sup>22</sup> In their view it would be appropriate to restrict freedom of movement to what was necessary for the purpose of the functions of the permanent mission. The majority of the members of the Commission came to the conclusion that the only grounds on which the host state could validly restrict freedom of movement were those of national security, and the article already covered that point. They thought that any attempt to introduce a limitation based on the functional element would unduly restrict the freedom of movement of members of permanent missions. The view of the majority of members was that it would be preferable not to add the reservation which had been provided for in the case of special missions and which was justified by the particular character of those missions. Reference was made in this respect to the fact that if difficulties arose in the case of permanent missions, it would be possible to resort to the consultations envisaged in Article 50. Reference was also made to the possibility of regulating such matters in the headquarters agreement between the host state and the Organization, a possibility which was covered by Article 4.

#### *Article 29. Freedom of communication*

1. The host state shall permit and protect free communication on the part of the permanent mission for all official purposes. In communicating with the government of the sending state, its diplomatic missions, its permanent missions, its consular posts and its special missions, wherever situated, the permanent mission may employ all appropriate means, including couriers and messages in code or cipher. However, the permanent mission may install and use a wireless transmitter only with the consent of the host state.

2. The official correspondence of the permanent mission shall be inviolable. Official correspondence means all correspondence relating to the permanent mission and its functions.

3. The bag of the permanent mission shall not be opened or detained.

<sup>22</sup> Official Records of the General Assembly, Twenty-second Session, Supplement No. 9 (A/6709/Rev.1 and Rev.1/Corr.1); Yearbook of the International Law Commission, 1967, Vol. II, p. 360.



4. The packages constituting the bag of the permanent mission must bear visible external marks of their [page 8] character and may contain only documents or articles intended for the official use of the permanent mission.

5. The courier of the permanent mission, who shall be provided with an official document indicating his status and the number of packages constituting the bag, shall be protected by the host state in the performance of his functions. He shall enjoy personal inviolability and shall not be liable to any form of arrest or detention.

6. The sending state or the permanent mission may designate couriers *ad hoc* of the permanent mission. In such cases the provisions of paragraph 5 of this article shall also apply, except that the immunities therein mentioned shall cease to apply when the courier *ad hoc* has delivered to the consignee the permanent mission's bag in his charge.

7. The bag of the permanent mission may be entrusted to the captain of a ship or of a commercial aircraft scheduled to land at an authorized port of entry. He shall be provided with an official document indicating the number of packages constituting the bag but he shall not be considered to be a courier of the permanent mission. The permanent mission may send one of its members to take possession of the bag directly and freely from the captain of the ship or of the aircraft.

#### *Commentary*

(1) This article is based on Article 27 of the Vienna Convention on Diplomatic Relations.

(2) Permanent missions to the United Nations, the specialized agencies and other international organizations enjoy in general freedom of communication on the same terms as the diplomatic missions accredited to the host state.

(3) Replies of the United Nations and the specialized agencies indicate also that the inviolability of correspondence, which is provided for in Article IV, section 11(b), of the Convention on the Privileges and Immunities of the United Nations<sup>23</sup> and in Article V, section 13(b), of the Convention on the Privileges and Immunities of the Specialized Agencies, has been fully recognized.

(4) One difference between this article and Article 27 of the Vienna Convention on Diplomatic Relations is the addition in paragraph 1 of the words "its special missions" in order to co-ordinate the article with Article 28, paragraph 1, of the draft articles on special missions.<sup>24</sup> Another is the addition of the words "its permanent missions," in order to enable the permanent missions of the sending state to communicate with each other.

(5) A further difference is that paragraph 7 of Article 29 provides that the bag of the permanent mission may be entrusted not only to the captain of a commercial aircraft, as provided for the diplomatic bag in Article 27 of

<sup>23</sup> United Nations, Treaty Series, Vol. I, p. 16.

<sup>24</sup> Official Records of the United Nations, Twenty-second Session, Supplement No. 9 (A/6709/Rev.1 and Rev.1/Corr.1); Yearbook of the International Law Commission, 1967, Vol. II, p. 361.

the Vienna Convention on Diplomatic Relations, but also to the captain of a merchant ship. This additional provision is taken from Article 35 of the Vienna Convention on Consular Relations and Article 28 of the draft articles on special missions.

(6) On the basis of Article 28 of the draft articles on special missions, the article uses the expression "the bag of the permanent mission" and the "courier of the permanent mission." The expressions "diplomatic bag" and "diplomatic courier" were not used in order to prevent any possibility of confusion with the bag and courier of the permanent diplomatic mission.

(7) The phrase "by arrangement with the appropriate authorities" which had been added to Article 28, paragraph 7, of the draft articles on special missions, has not been included in paragraph 7. In the view of the Commission, although the provision might be of some value for special missions, which were not permanent, the same was not true of permanent missions, for which such arrangements were made on a continuing basis and not on each occasion. Permanent missions were in this respect similar to diplomatic missions. The view was expressed that the omission of the phrase was not, however, to be taken as implying that a member of the permanent mission could, for example, proceed to an aircraft without observing the applicable regulations.

#### *Article 30. Personal Inviolability*

The persons of the permanent representative and of the members of the diplomatic staff of the permanent mission shall be inviolable. They shall not be liable to any form of arrest or detention. The host state shall treat them with due respect and shall take all appropriate steps to prevent any attack on their persons, freedom or dignity.

#### *Article 31. Inviolability of residence and property*

1. The private residence of the permanent representative and of the members of the diplomatic staff of the permanent mission shall enjoy the same inviolability and protection as the premises of the permanent mission.

2. Their papers, correspondence and, except as provided in paragraph 3 of Article 32, their property, shall likewise enjoy inviolability.

#### *Commentary*

(1) Articles 30 and 31 are based on the provisions of Articles 29 and 30 of the Vienna Convention on Diplomatic Relations and of the draft articles on special missions (Art. 29 and 30).<sup>25</sup>

(2) Articles 30 and 31 deal with two generally recognized immunities which are essential for the performance of the functions of the permanent representative and of the members of the diplomatic staff of the permanent mission.

(3) The principle of the personal inviolability of the permanent representative and of the members of the [page 9] diplomatic staff, which Article

<sup>25</sup> *Ibid.*

30 confirms, implies, as in the case of the inviolability of the premises of the permanent mission, the obligation for the host state to respect, and to ensure respect for, the person of the individuals concerned. The host state must take all necessary measures to that end, which may include the provision of a special guard if circumstances so require.

(4) Inviolability of all papers and documents of representatives of members to the organs of the organizations concerned is generally provided for in the Conventions on the Privileges and Immunities of the United Nations, the Specialized Agencies and other international organizations.

(5) In paragraph 1 of its commentary on Article 28 (Inviolability of residence and property) of its draft articles on diplomatic intercourse and immunities adopted at its tenth session (1958), the International Law Commission stated that: "This article concerns the inviolability accorded to the diplomatic agent's residence and property. Because this inviolability arises from that attaching to the person of the diplomatic agent, the expression 'the private residence of a diplomatic agent' necessarily includes even a temporary residence of the diplomatic agent."<sup>26</sup>

#### *Article 32. Immunity from jurisdiction*

1. The permanent representative and the members of the diplomatic staff of the permanent mission shall enjoy immunity from the criminal jurisdiction of the host state. They shall also enjoy immunity from its civil and administrative jurisdiction, except in the case of:

(a) A real action relating to private immovable property situated in the territory of the host state unless the person in question holds it on behalf of the sending state for the purposes of the permanent mission;

(b) An action relating to succession in which the person in question is involved as executor, administrator, heir or legatee as a private person and not on behalf of the sending state;

(c) An action relating to any professional or commercial activity exercised by the person in question in the host state outside his official functions;

[(d) An action for damages arising out of an accident caused by a vehicle used outside the official functions of the person in question.]

2. The permanent representative and the members of the diplomatic staff of the permanent mission are not obliged to give evidence as witnesses.

3. No measures of execution may be taken in respect of the permanent representative or a member of the diplomatic staff of the permanent mission except in cases coming under sub-paragraphs (a), (b) [and] (c) [and (d)] of paragraph 1 of this article, and provided that the measures concerned can be taken without infringing the inviolability of his person or of his residence.

4. The immunity of the permanent representative or of a member of the diplomatic staff of the permanent mission from the jurisdiction of the host state does not exempt him from the jurisdiction of the sending state.

<sup>26</sup> Official Records of the General Assembly, Thirteenth Session, Supplement No. 9 (A/3859); Yearbook of the International Law Commission, 1958, Vol. II, p. 98.

*Commentary*

(1) Article 32 is based on Article 31 of the Vienna Convention on Diplomatic Relations.

(2) The immunity from criminal jurisdiction granted under paragraph 1 of Article 32 is complete and the immunity from civil and administrative jurisdiction is subject only to the exceptions stated in paragraph 1 of the article. This constitutes the principal difference between the "diplomatic" immunity enjoyed by permanent missions and the "functional" immunity accorded to delegations to organs of international organizations and conferences by the Conventions on the Privileges and Immunities of the United Nations and of the Specialized Agencies. Article IV, section 11 (*a*), of the Convention on the Privileges and Immunities of the United Nations and Article V, section 13 (*a*), of the Convention on the Privileges and Immunities of the Specialized Agencies accord to the representatives of members of the meetings of organs of the organization concerned or to the conferences convened by it "immunity from legal process of every kind" in respect of "words spoken or written and all acts done by them" in their official capacity.

(3) The Commission agreed that the phrase "civil and administrative jurisdiction" in paragraph 1 of Article 32 is used in a general sense, in contradistinction to "criminal jurisdiction," and includes for instance, commercial and labour jurisdiction.

(4) After a lengthy discussion, the Commission was unable, owing to a wide divergence of views, to reach any decision on the substance of the provision in sub-paragraph 1 (*d*). It decided to place the provision in brackets and to bring it to the attention of governments. Those favouring the proposal, which was based on sub-paragraph (2) (*d*) of Article 31 of the draft articles on special missions, argued that it would meet a real and growing problem which had, it was said, been inadequately recognized at the 1961 Vienna Conference on Diplomatic Intercourse and Immunities. Further, there were problems in some countries concerning the application and effect of insurance laws and practices as well as the adequacy of the insurance coverage. On the other hand, it was argued that the Vienna precedent should be followed, since it provided the closer analogy. In addition, considerable emphasis was placed on Articles 34 and 45 of the present draft; the former provision, which goes beyond the corresponding resolution of the 1961 Vienna Conference, requires the sending state to waive immunity in respect of civil claims in the host state "when this can be done without impeding the performance of the functions of the permanent mission"; if immunity is not waived the sending state "shall use its best endeavours to bring about a just settlement of such claims." The latter provision requires all persons enjoying privileges and immunities to respect the laws and regulations of the host state. Those opposing the proposal in sub-paragraph 1 (*d*) also argued that one particular kind of claim should not be singled out in this way and that the functional line drawn in it would be difficult to apply.

*Article 33. Waiver of immunity*

1. The immunity from jurisdiction of the permanent representative or members of the diplomatic staff of the permanent mission and persons enjoying immunity under Article 40 may be waived by the sending state.

2. Waiver must always be express.

3. The initiation of proceedings by the permanent representative, by a member of the diplomatic staff of the permanent mission or by a person enjoying immunity from jurisdiction under Article 40 shall preclude him from invoking immunity from jurisdiction in respect of any counter-claim directly connected with the principal claim.

4. Waiver of immunity from jurisdiction in respect of civil or administrative proceedings shall not be held to imply waiver of immunity in respect of the execution of the judgment, for which a separate waiver shall be necessary.

*Commentary*

(1) Article 33 is based on the provisions of Article 32 of the Vienna Convention on Diplomatic Relations. The basic principle of the waiver of immunity is contained in Article IV, section 14, of the Convention on the Privileges and Immunities of the United Nations which states:

"Privileges and immunities are accorded to the representatives of Members not for the personal benefit of the individuals themselves, but in order to safeguard the independent exercise of their functions in connection with the United Nations. Consequently a Member not only has the right but is under a duty to waive the immunity of its representative in any case where in the opinion of the Member the immunity would impede the course of justice, and it can be waived without prejudice to the purpose for which the immunity is accorded."

(2) This provision was reproduced *mutatis mutandis* in Article V, section 16, of the Convention on the Privileges and Immunities of the Specialized Agencies and in a number of the corresponding instruments of regional organizations.

*Article 34. Settlement of civil claims*

The sending state shall waive the immunity of any of the persons mentioned in paragraph 1 of Article 33 in respect of civil claims in the host state when this can be done without impeding the performance of the functions of the permanent mission. If the sending state does not waive immunity, it shall use its best endeavours to bring about a just settlement of such claims.

*Commentary*

(1) This article is based on the important principle stated in Resolution II adopted on 14 April 1961 by the United Nations Conference on Diplomatic Intercourse and Immunities.<sup>27</sup>

<sup>27</sup> Official Records of the United Nations Conference on Diplomatic Intercourse and Immunities (1961), Vol. II, document A/Conf.20/10/Add.1, p. 90.

(2) The International Law Commission embodied this principle in Article 42 of its draft articles on special missions because, as stated in the commentary on that article, "the purpose of immunities is to protect the interests of one sending state, not those of the persons concerned, and in order to facilitate, as far as possible, the satisfactory settlement of civil claims made in the receiving state against members of special missions. This principle is also referred to in the draft preamble drawn up by the Commission."<sup>28</sup>

*Article 35. Exemption from social security legislation*

1. Subject to the provisions of paragraph 3 of this article, the permanent representative and the members of the diplomatic staff of the permanent mission shall with respect to services rendered for the sending state be exempt from social security provisions which may be in force in the host state.

2. The exemption provided for in paragraph 1 of this article shall also apply to persons who are in the sole private employ of the permanent representative or of a member of the diplomatic staff of the permanent mission, on condition:

(a) That such employed persons are not nationals of or permanently resident in the host state; and

(b) That they are covered by the social security provisions which may be in force in the sending state or a third state.

3. The permanent representative and the members of the diplomatic staff of the permanent mission who employ persons to whom the exemption provided for in paragraph 2 of this article does not apply shall observe the obligations which the social security provisions of the host state impose upon employers.

4. The exemption provided for in paragraphs 1 and 2 of this article shall not preclude voluntary participation in the social security system of the host state provided that such participation is permitted by that state.

5. The provisions of this article shall not affect bilateral or multilateral agreements concerning social security concluded previously and shall not prevent the conclusion of such agreements in the future.

*Commentary*

(1) Article 35 is based on Article 33 of the Vienna Convention on Diplomatic Relations.

(2) Like paragraph 2 of Article 32 of the draft on special missions, paragraph 2 of Article 35 substitutes [*page 11*] the expression "persons who are in the sole private employ" for the expression "private servants," which is used in Article 33 of the Vienna Convention. Referring to this change in terminology, the International Law Commission stated in paragraph 2 of its

<sup>28</sup> Official Records of the General Assembly, Twenty-second Session, Supplement No. 9 (A/6709/Rev.1 and Rev.1/Corr.1), pp. 21, 24; Yearbook of the International Law Commission, 1967, Vol. II, pp. 365, 367, 368.

commentary on Article 32 of the draft articles on special missions: "Article 32 . . . applies not only to servants in the strict sense of the term, but also to other persons in the private employ of members of the special mission such as children's tutors and nurses."<sup>29</sup>

(3) The Commission intends to consider, in the light of the comments to be received from governments, whether paragraph 5 is necessary in view of the provisions of Articles 4 and 5 of the present draft.

#### *Article 36. Exemption from dues and taxes*

The permanent representative and the members of the diplomatic staff of the permanent mission shall be exempt from all dues and taxes, personal or real, national, regional or municipal, except:

(a) Indirect taxes of a kind which are normally incorporated in the price of goods or services;

(b) Dues and taxes on private immovable property situated in the territory of the host state, unless the person concerned holds it on behalf of the sending state for the purposes of the permanent mission;

(c) Estate, succession or inheritance duties levied by the host state, subject to the provisions of paragraph 4 of Article 42;

(d) Dues and taxes on private income having its source in the host state and capital taxes on investments made in commercial undertakings in the host state;

(e) Charges levied for specific services rendered;

(f) Registration, court or record fees, mortgage dues and stamp duty, with respect to immovable property, subject to the provisions of Article 26.

#### *Commentary*

(1) This article is based on Article 34 of the Vienna Convention on Diplomatic Relations.

(2) The immunity of representatives from taxation is dealt with indirectly in Article IV, section 13, of the Convention on the Privileges and Immunities of the United Nations which provides that:

"Where the incidence of any form of taxation depends upon residence, periods during which the representatives of Members to the principal and subsidiary organs of the United Nations and to conferences convened by the United Nations are present in a state for the discharge of their duties shall not be considered as periods of residence."

(3) This provision was reproduced *mutatis mutandis* in Article V, section 15, of the Convention on the Privileges and Immunities of the Specialized Agencies and in a number of the corresponding instruments of regional organizations.

(4) Except in the case of nationals of the host state, representatives enjoy extensive exemption from taxation. In the International Civil Aviation

<sup>29</sup> Official Records of the General Assembly, Twenty-second Session, Supplement No. 9 (A/6709/Rev.1 and Rev.1/Corr.1), p. 19; Yearbook of the International Law Commission, 1967, Vol. II, p. 362.

Organization (ICAO) and the United Nations Educational Scientific and Cultural Organization (UNESCO) all representatives, and in FAO and IAEA, resident representatives, are granted the same exemptions in respect of taxation as diplomats of the same rank accredited to the host state concerned. In the case of IAEA, no taxes are imposed by the host state on the premises used by missions or delegates, including rented premises and parts of buildings. Permanent missions to UNESCO pay taxes only for services rendered and real property tax ("*contribution foncière*") when the permanent representative is the owner of the building. Permanent representatives are exempt from tax on movable property ("*contribution mobilière*"), a tax imposed in France on inhabitants of rented or occupied properties, in respect of their principal residence but not in respect of any secondary residence.<sup>30</sup>

(5) The final phrase of paragraph (f) may give rise to difficulties of interpretation mainly because it states an exception to a rule which is itself an exception. It is, however, based on the corresponding provision (Art. 34) of the Vienna Convention on Diplomatic Relations. The Commission would be interested to learn whether governments have found any practical difficulties in applying that provision.

#### *Article 37. Exemption from personal services*

The host state shall exempt the permanent representative and the members of the diplomatic staff of the permanent mission from all personal services, from all public service of any kind whatsoever, and from military obligations such as those connected with requisitioning, military contributions and billeting.

#### *Commentary*

(1) This article is based on the provisions of Article 35 of the Vienna Convention on Diplomatic Relations. The Commission's commentary on the provision on which Article 35 was based (Article 33 of the draft articles on diplomatic intercourse and immunities), states that it dealt "with the case where certain categories of persons are obliged, as part of their general civic duties or in cases of emergency, to render personal services or to make personal contributions."<sup>31</sup>

(2) The immunity in respect of national service obligations provided in Article IV, section 11 (d), of the Convention on the Privileges and Immunities of the United Nations and Article V, section 13 (d), of the Convention on the Privileges and Immunities of the Specialized Agencies has been widely acknowledged. That [page 12] immunity does not normally apply when the representative is a national of the host state.<sup>32</sup> The phrase "military obligations" covers military obligations of all kinds; the enumeration in Article 37 is by way of example only.

<sup>30</sup> Study of the Secretariat, Yearbook of the International Law Commission, 1967, documents A/CN.4/L.118 and Add.1 and 2, p. 201, par. 45.

<sup>31</sup> Official Records of the General Assembly, Thirteenth Session, Supplement No. 9 (A/3859); Yearbook of the International Law Commission, 1958, Vol. II, p. 100.

<sup>32</sup> Study of the Secretariat, Yearbook of the International Law Commission, 1967, documents A/CN.4/L.118 and Add.1 and 2, p. 200, par. 37.



*Article 38. Exemption from customs duties and inspection*

1. The host state shall, in accordance with such laws and regulations as it may adopt, permit entry of and grant exemption from all customs duties, taxes and related charges other than charges for storage, cartage and similar services, on:

(a) Articles for the official use of the permanent mission;

(b) Articles for the personal use of the permanent representative or a member of the diplomatic staff of the permanent mission or members of his family forming part of his household, including articles intended for his establishment.

2. The personal baggage of the permanent representative or a member of the diplomatic staff of the permanent mission shall be exempt from inspection, unless there are serious grounds for presuming that it contains articles not covered by the exemptions mentioned in paragraph 1 of this article, or articles the import or export of which is prohibited by the law or controlled by the quarantine regulations of the host state. Such inspection shall be conducted only in the presence of the person enjoying the exemption or of his authorized representative.

*Commentary*

(1) This article is based on Article 36 of the Vienna Convention on Diplomatic Relations.

(2) While in general, permanent representatives and members of the diplomatic staff of permanent missions enjoy exemption from customs and excise duties, the detailed application of this exemption in practice varies from one host state to another according to the headquarters agreements and to the system of taxation in force.

(3) As regards the United Nations Headquarters, the United States Code of Federal Regulations, Title 19—Customs Duties (Revised 1964), provides in section 10.30 *b*, paragraph (b), that resident representatives and members of their staffs may import “. . . without entry and free of duty and internal-revenue tax articles for their personal or family use.”<sup>33</sup>

(4) At the United Nations Office at Geneva the matter is dealt with largely in the Swiss Customs Regulation of 23 April 1952. Briefly, permanent missions may import all articles for official use and belonging to the government they represent (Art. 15). In accordance with the declaration of the Swiss Federal Council of 20 May 1958,<sup>34</sup> the heads of permanent delegations may import free of duty all articles destined for their own use or that of their family (Art. 16, paragraph 1). Other members of permanent delegations have a similar privilege except that the importation of furniture may only be made once (Art. 16, paragraph 2).<sup>35</sup>

(5) The position in respect of permanent missions to specialized agencies having their headquarters in Switzerland is identical with that of permanent missions to the United Nations Office at Geneva. In the case of

<sup>33</sup> *Ibid.*, p. 183, par. 134. For details of the position in respect of the various Federal and State taxes in New York, *ibid.*, pp. 183–186, secs. 17 and 18.

<sup>34</sup> *Ibid.*, p. 173, par. 62.

<sup>35</sup> *Ibid.*, p. 183, par. 136.

FAO, the extent of the exemption of resident representatives depends on their diplomatic status and is granted in accordance with the general rules relating to diplomatic envoys. Permanent representatives to UNESCO assimilated to heads of diplomatic missions can import goods at any time for their own use and for that of their mission free of duty. Other members of permanent missions may import their household goods and effects free of duty at the time of taking up their appointment.

*Article 39. Exemption from laws concerning acquisition of nationality*

Members of the permanent mission not being nationals of the host state, and members of their families forming part of their household, shall not, solely by the operation of the law of the host state, acquire the nationality of that state.

*Commentary*

(1) This article is based on the rule stated in Article II of the Optional Protocol concerning Acquisition of Nationality adopted on 18 April 1961 by the United Nations Conference on Diplomatic Intercourse and Immunities.<sup>86</sup>

(2) The origin of the rule stated in that protocol is to be found in Article 35 of the draft articles on diplomatic intercourse and immunities adopted by the Commission at its tenth session (1958). At the time, the Commission gave the following explanation on the matter in its commentary on Article 35:

"This article is based on the generally received view that a person enjoying diplomatic privileges and immunities should not acquire the nationality of the receiving state solely by the operation of the law of that state, and without his consent. In the first place the article is intended to cover the case of a child born on the territory of the receiving state of parents who are members of a foreign diplomatic mission and who also are not nationals of the receiving state. The child should not automatically acquire the nationality of the receiving state solely by virtue of the fact that the law of that state would normally confer local nationality in the circumstances. Such a child may, however, opt for that nationality later if the legisla-[page 13]tion of the receiving state provides for such an option. The article covers, secondly, the acquisition of the receiving state's nationality by a woman member of the mission in consequence of her marriage to a local national. Similar considerations apply in this case also and the article accordingly operates to prevent the automatic acquisition of local nationality in such a case. On the other hand, when the daughter of a member of the mission who is not a national of the receiving state marries a national of that state, the rule contained in this article would not prevent her from acquiring the nationality of that state, be-

<sup>86</sup> Official Records of the United Nations Conference on Diplomatic Intercourse and Immunities (1961), Vol. II, document A/Conf.20/11, p. 88.

cause, by marrying, she would cease to be part of the household of the member of the mission.”<sup>87</sup>

(3) In support of the Commission's recommendation that the provision should form an integral part of the draft articles on permanent missions, the Commission wishes to point out a significant difference between the Vienna Convention on Diplomatic Relations and the present draft with regard to the scope of application of the rule on acquisition of nationality. The Optional Protocol concerning Acquisition of Nationality of 1961 was intended to apply to the bilateral relationships between the great number of states members of the community of nations. In the case of permanent missions, on the other hand, the persons whose nationality is in question are on the territory of the host state in virtue of their state's membership of the international organization and not of any purely bilateral relation between the two states; indeed, bilateral diplomatic relations may even in some cases not exist between the host state and the sending state. Similarly, the element of reciprocity which exists in the case of diplomatic missions is not present in the case of permanent missions. Accordingly, the Commission considered that in the case of permanent missions exemption from the operation of the local laws of nationality should be made a matter of express provision and not relegated to an Optional Protocol.

*Article 40. Privileges and immunities of persons other than the permanent representative and the members of the diplomatic staff*

1. The members of the family of the permanent representative forming part of his household and the members of the family of a member of the diplomatic staff of the permanent mission forming part of his household shall, if they are not nationals of the host state, enjoy the privileges and immunities specified in Articles 30 to 38.

2. Members of the administrative and technical staff of the permanent mission, together with members of their families forming part of their respective households, shall, if they are not nationals of or permanently resident in the host state, enjoy the privileges and immunities specified in Articles 30 to 37, except that the immunity from civil and administrative jurisdiction of the host state specified in paragraph 1 of Article 32 shall not extend to acts performed outside the course of their duties. They shall also enjoy the privileges specified in paragraph 1 of Article 38, in respect of articles imported at the time of first installation.

3. Members of the service staff of the permanent mission who are not nationals of or permanently resident in the host state shall enjoy immunity in respect of acts performed in the course of their duties, exemption from dues and taxes on the emoluments they receive by reason of their employment and the exemption contained in Article 35.

4. Private staff of members of the permanent mission shall, if they are not nationals of or permanently resident in the host state, be exempt from

<sup>87</sup> Official Records of the General Assembly, Thirteenth Session, Supplement No. 9 (A/3859); Yearbook of the International Law Commission, 1958, Vol. II, p. 101.

dues and taxes on the emoluments they receive by reason of their employment. In other respects, they may enjoy privileges and immunities only to the extent admitted by the host state. However, the host state must exercise its jurisdiction over those persons in such a manner as not to interfere unduly with the performance of the functions of the permanent mission.

*Commentary*

(1) This article is based on Article 37 of the Vienna Convention on Diplomatic Relations.

(2) The Study of the Secretariat does not include data on the privileges and immunities which host states accord to the members of the families of permanent representatives, to the members of the administrative and technical staff and of the service staff of permanent missions and to the private staff of the members of permanent missions. It is assumed that the practice relating to the status of these persons conforms to the corresponding rules established within the framework of inter-state diplomatic relations as codified and developed in the Vienna Convention on Diplomatic Relations. The assumption is corroborated by the identity of the legal bases of the status of these persons inasmuch as their status attaches to and derives from the diplomatic agents or permanent representatives, who are accorded analogous diplomatic privileges and immunities.

(3) In paragraph 4 of the article the expression "private servants" which appears in paragraph 4 of Article 37 of the Vienna Convention on Diplomatic Relations, has been replaced by the expression "private staff" on the model of Articles 32 and 38 of the draft articles on special missions. Paragraph 2 of the commentary on Article 32 of the draft articles on special missions, quoted in paragraph (2) of the commentary on Article 35 of the present draft, explains the change. That explanation is also valid for permanent missions to international organizations.

*Article 41. Nationals of the host state and persons permanently resident in the host state*

1. Except in so far as additional privileges and immunities may be granted by the host state, the permanent representative and any member of the diplomatic staff of the permanent mission who are nationals of or permanently resident in that state shall enjoy immunity from jurisdiction, and inviolability, only in respect of official acts performed in the exercise of their functions.

[page 14] 2. Other members of the staff of the permanent mission and persons on the private staff who are nationals of or permanently resident in the host state shall enjoy privileges and immunities only to the extent admitted by the host state. However, the host state must exercise its jurisdiction over those members and persons in such a manner as not to interfere unduly with the performance of the functions of the mission.

*Commentary*

(1) This article is based on Article 38 of the Vienna Convention on Diplomatic Relations. Here, too, the expression "private servants" has been replaced by "private staff."

(2) A number of the conventions on the privileges and immunities of international organizations, whether universal or regional, stipulate that the provisions which define the privileges and immunities of the representatives of members are not applicable as between a representative and the authorities of the state of which he is a national or of which he is or has been the representative. Since the case of permanent representatives who are nationals of the host state is covered in Article 41, paragraph 1, the Commission did not deem it advisable to include in this paragraph a clause concerning permanent representatives who are, or have been, representatives of that state. It considered that any such clause would refer to such an exceptional situation that there was no need to mention it. Moreover, if a person represented or had represented the host state, he was very likely to be one of its nationals and therefore subject to the limitation already imposed by the paragraph.

*Article 42. Duration of privileges and immunities*

1. Every person entitled to privileges and immunities shall enjoy them from the moment he enters the territory of the host state on proceeding to take up his post or, if already in its territory, from the moment when his appointment is notified to the host state by the Organization or by the sending state.

2. When the functions of a person enjoying privileges and immunities have come to an end, such privileges and immunities shall normally cease at the moment when he leaves the country, or on expiry of a reasonable period in which to do so. However, with respect to acts performed by such a person in the exercise of his functions as a member of the permanent mission, immunity shall continue to subsist.

3. In case of the death of a member of the permanent mission, the members of his family shall continue to enjoy the privileges and immunities to which they are entitled until the expiry of a reasonable period in which to leave the country.

4. In the event of the death of a member of the permanent mission not a national of or permanently resident in the host state or of a member of his family forming part of his household, the host state shall permit the withdrawal of the movable property of the deceased, with the exception of any property acquired in the country the export of which was prohibited at the time of his death. Estate, succession and inheritance duties shall not be levied on movable property the presence of which in the host state was due solely to the presence there of the deceased as a member of the permanent mission or as a member of the family of a member of the permanent mission.

*Commentary*

(1) This article is based on the provisions of Article 39 of the Vienna Convention on Diplomatic Relations. Having regard to the decision set out in paragraph 18 of this report, the Commission has not, however, included the reference to the case of armed conflict which appears in Article 39 of the Vienna Convention.

(2) The first two paragraphs of the article deal with the times of commencement and termination of entitlements for persons who enjoy privileges and immunities in their official capacity. For those who do not enjoy privileges and immunities in their official capacity other dates may apply, viz. the dates of commencement and termination of the relationship which constitutes the grounds for the entitlement. The Commission noted that the Vienna Convention on Diplomatic Relations did not contain any specific provisions on the question, whereas the Vienna Convention on Consular Relations did so in Article 53. The Commission wished to invite the views of governments as to whether it was desirable to include a provision on these lines.

(3) Article IV, section 11, of the Convention on the Privileges and Immunities of the United Nations and Article V, section 13, of the Convention on the Privileges and Immunities of the Specialized Agencies provide that representatives shall enjoy the privileges and immunities listed therein while exercising their functions and during their journey to and from the place of meeting. In 1961 the Legal Counsel of the United Nations replied to an inquiry made by one of the specialized agencies as to the interpretation to be given to the first part of this phrase. The reply contained the following: "You enquire whether the words 'while exercising their functions' should be given a narrow or broad interpretation . . . I have no hesitation in believing that it was the broad interpretation that was intended by the authors of the Convention."<sup>88</sup>

(4) Article IV, section 12 of the Convention on the Privileges and Immunities of the United Nations, which is reproduced *mutatis mutandis* in Article V, section 14 of the Convention on the Privileges and Immunities of the Specialized Agencies, provides that:

"In order to secure, for the representatives of Members to the principal and subsidiary organs of the United Nations and to conferences convened by the United Nations, complete freedom of speech and independence in the discharge of their duties, the immunity from legal process in respect of words spoken or written and all acts done by them in discharging their duties shall continue to be accorded, [page 15] notwithstanding that the persons concerned are no longer the representatives of Members."

*Article 43. Transit through the territory of a third state*

1. If the permanent representative or a member of the diplomatic staff of the permanent mission passes through or is in the territory of a third

<sup>88</sup> Study of the Secretariat, Yearbook of the International Law Commission, 1967, Vol. II, documents A/CN.4/L.118 and Add.1 and 2, p. 176, par. 87.

state, which has granted him a passport visa if such visa was necessary, while proceeding to take up or to return to his post, or when returning to his own country, the third state shall accord him inviolability and such other immunities as may be required to ensure his transit or return. The same shall apply in the case of the members of his family enjoying privileges or immunities who are accompanying the permanent representative or member of the diplomatic staff of the permanent mission or travelling separately to join him or to return to their country.

2. In circumstances similar to those specified in paragraph 1 of this article, third states shall not hinder the passage of members of the administrative and technical or service staff of the permanent mission, and of members of their families through their territories.

3. Third states shall accord to official correspondence and other official communications in transit, including messages in code or cipher, the same freedom and protection as is accorded by the host state. They shall accord to the couriers of the permanent mission who have been granted a passport visa if such visa was necessary, and to the bags of the permanent mission in transit the same inviolability and protection as the host state is bound to accord.

4. The obligations of third states under paragraphs 1, 2 and 3 of this article shall also apply to the persons mentioned respectively in those paragraphs, and to the official communications and bags of the permanent mission, whose presence in the territory of the third state is due to *force majeure*.

#### *Commentary*

(1) The provisions of this article are based on Article 40 of the Vienna Convention on Diplomatic Relations.

(2) Reference has been made in paragraph (3) of the commentary on Article 42 to the broad interpretation given by the Legal Counsel of the United Nations to the provision of Article IV, section 11, of the Convention on the Privileges and Immunities of the United Nations and of Article V, section 13, of the Convention on the Privileges and Immunities of the Specialized Agencies which stipulates that representatives shall enjoy the privileges and immunities listed in those conventions while exercising their functions and during their journeys to and from the place of meeting.

(3) The Study of the Secretariat mentions the special problem which may arise when access to the country in which a United Nations meeting is to be held is only possible through another state. It states that:

“While there is little practice, the Secretariat takes the position that such states are obliged to grant access and transit to the representatives of Member States for the purpose in question.”<sup>39</sup>

(4) During the discussion in the Commission the question was raised of deleting the sentence “which has granted him a passport visa if such

<sup>39</sup> *Ibid.*, p. 190, par. 168.

visa was necessary" in paragraph 1 of Article 43. It was noted, however, that when the Commission had drafted the corresponding articles of the Vienna Convention on Diplomatic Relations and of the draft on special missions, it had not intended to lay down an obligation for third states to grant transit, but merely wished to regulate the status of diplomatic agents in transit. Doubts were expressed as to whether such an obligation would be a positive rule at present and as to whether states would be prepared to accept it as *lex ferenda*. Reference was made to the difficulties which the obligation of granting transit would give rise to and in particular to the difficulties that would be encountered in the case in which the request for transit was made on behalf of a person who might be objectionable to the third state. Particular attention was given to the situation when a member of the permanent mission, being a national of a land-locked state, finds himself obliged to pass through the territory of the third state. In such an exceptional situation there is perhaps a case for asserting the existence of an obligation on the part of the third state, at least when it is a member of the organization concerned, by virtue of Articles 104 and 105 of the United Nations Charter and similar provisions in the constitutions of specialized agencies and regional organizations.

#### Article 44. Non-discrimination

In the application of the provisions of the present articles, no discrimination shall be made as between states.

#### Commentary

(1) Article 44 is based on paragraph 1 of Article 47 of the Vienna Convention on Diplomatic Relations.

(2) A difference of substance between the two articles is the non-inclusion in Article 44 of paragraph 2 of Article 47 of the Vienna Convention. That paragraph refers to two cases in which although an inequality of treatment is implied, no discrimination occurs, since the inequality of treatment in question is justified by the rule of reciprocity.

(3) In general, headquarters agreements of international organizations contain no restrictions on privileges and immunities of members of permanent missions based on the application of the principle of reciprocity in the relations between the host state and the sending state. Some headquarters agreements, however, include a clause providing that the host state shall grant permanent representatives the privileges and immunities which it accords to diplomatic envoys credited to it, "subject to corresponding conditions and obligations." Examples of such clauses may be found in Article V, section 15, of the Headquarters Agreement of the United Nations, [page 16] Article XI, section 24, paragraph (a), of the Headquarters Agreement of FAO and Article 1 of the Headquarters Agreement of OAS.

(4) The Study of the Secretariat states that it has been the understanding of the Secretariat of the United Nations that the privileges and immunities granted should generally be those afforded to the diplomatic corps as a whole, and should not be subject to particular conditions imposed, on a



basis of reciprocity, upon the diplomatic missions of particular states.<sup>40</sup> In his statement at the 1016th meeting of the Sixth Committee of the General Assembly, the Legal Counsel of the United Nations stated that:

"The Secretary-General, in interpreting diplomatic privileges and immunities, would look to provisions of the Vienna Convention so far as they would appear relevant *mutatis mutandis* to representatives to United Nations organs and conferences. It should of course be noted that some provisions such as those relating to *agrément*, nationality or reciprocity have no relevancy in the situation of representatives to the United Nations."<sup>41</sup>

(5) In deciding not to include a second paragraph on the model of paragraph 2 of Article 47 of the Vienna Convention on Diplomatic Relations, the Commission took into account the fact that the extension or restriction of privileges and immunities applies as a consequence of the operation of reciprocity within the framework of bilateral diplomatic relations between the sending state and the receiving state. In the case of multilateral diplomacy, however, it is a matter of relations among states and international organizations and not a matter which belongs exclusively to the relations between the host state and the sending state.

(6) Article 44 is formulated in such broad terms as to make its field of application cover all the obligations provided for in the draft, whether assumed by the host state, the Organization or third states.

(7) The Commission wishes to point out that the article is placed provisionally and will be removed to the end of the whole draft in order to apply not only to permanent missions, but also to the parts on permanent observers from non-member states and delegations to organs of international organizations in the event that such parts are included in the draft.

### SECTION 3. CONDUCT OF THE PERMANENT MISSION AND ITS MEMBERS

#### *Article 45. Respect for the laws and regulations of the host state*

1. Without prejudice to their privileges and immunities, it is the duty of all persons enjoying such privileges and immunities to respect the laws and regulations of the host state. They also have a duty not to interfere in the internal affairs of that state.

2. In case of grave and manifest violation of the criminal law of the host state by a person enjoying immunity from criminal jurisdiction, the sending state shall, unless it waives this immunity, recall the person concerned, terminate his functions with the mission or secure his departure, as appropriate. This provision shall not apply in the case of any act that the person concerned performed in carrying out the functions of the permanent mission within either the Organization or the premises of a permanent mission.

<sup>40</sup> *Ibid.*, p. 178, par. 96.

<sup>41</sup> Official Records of the General Assembly, Twenty-second Session, Annexes, agenda item 98, document A/C.6/385, par. 4.

3. The premises of the permanent mission shall not be used in any manner incompatible with the exercise of the functions of the permanent mission.

*Commentary*

(1) Paragraphs 1 and 3 of this article are based on the provisions of Article 41, paragraphs 1 and 3, of the Vienna Convention on Diplomatic Relations, and Article 48 of the draft articles on special missions.

(2) Unlike paragraph 3 of Article 41 of the Vienna Convention on Diplomatic Relations and paragraph 2 of Article 48 of the draft articles on special missions, paragraph 3 of this article does not include the expression "as laid down (envisaged) in the present Convention (articles) or by (in) other rules of general international law," nor a phrase similar to that referring to "any special agreements in force between the sending and the receiving state." These were deemed unnecessary, particularly in the light of Article 4 of the present draft.

(3) Paragraph 2 has been included in the present article in order to ensure the protection of the host state in the event of a grave and manifest breach of its criminal law by a person enjoying immunity from criminal jurisdiction in the absence of the *persona non grata* procedure in the context of relations between states and international organizations. The expression "unless it waives this immunity," has been included in paragraph 2 in order to emphasize that the provisions of the paragraph are not intended to derogate from those of Article 33. The three alternatives offered to the sending state for the discharge of the obligation imposed on it by paragraph 2 are to be understood as covering the cases of the permanent representative or a member of the diplomatic staff, a member of one of the other categories in the permanent mission and the members of their families. The last sentence of the paragraph contains a saving clause intended *inter alia* to safeguard the independent exercise of the functions of the members of the permanent mission, while keeping within the rule grave crimes committed outside the Organization or the premises of permanent missions, including grave traffic violations.

*Article 43. Professional activity*

The permanent representative and the members of the diplomatic staff of the permanent mission shall not practise for personal profit any professional or commercial activity in the host state.

*Commentary*

(1) This article is based on the provisions of Article 42 of the Vienna Convention on Diplomatic Relations and Article 49 of the draft articles on special missions.

[page 17] (2) In paragraph 2 of the commentary on Article 49 of its draft articles on special missions, the Commission stated that:

"Some Governments proposed the addition of a clause providing that the receiving state may permit the persons referred to in Article 49 of the draft to practise a professional or commercial activity on its territory. The Commission took the view that the right of the receiving state to grant such permission is self-evident. It therefore preferred to make no substantive departure from the text of the Vienna Convention on this point."<sup>42</sup>

#### SECTION 4. END OF FUNCTIONS

##### *Article 47. End of the functions of the permanent representative or of a member of the diplomatic staff*

The functions of the permanent representative or of a member of the diplomatic staff of the permanent mission come to an end, *inter alia*:

- (a) On notification to this effect by the sending state to the Organization;
- (b) If the permanent mission is finally or temporarily recalled.

##### *Commentary*

(1) Sub-paragraph (a) of this article is based on the provisions of sub-paragraph (a) of Article 43 of the Vienna Convention on Diplomatic Relations.

(2) Sub-paragraph (b) refers to the case where the sending state recalls the permanent mission for reasons which may or may not relate to the membership of the sending state in the organization to which that mission has been sent.

(3) This article does not contain a provision corresponding to sub-paragraph (b) of Article 43 of the Vienna Convention on Diplomatic Relations, which provides as one of the modes of termination of the function of a diplomatic agent the "notification by the receiving state to the sending state that, in accordance with paragraph 2 of Article 9, it refuses to recognize the diplomatic agent as a member of the mission." Under paragraph 2 of Article 9 of the Vienna Convention on Diplomatic Relations, the receiving state may refuse such recognition if the sending state refuses or fails within a reasonable period to carry out its obligations under paragraph 1—relating to the declaration of a diplomatic agent as *persona non grata* by the receiving state. As mentioned in paragraph (3) of the Commentary on Article 10 of the present draft,

"The members of the permanent mission are not accredited to the host state in whose territory the seat of the organization is situated. They do not enter into direct relationship with the host state, unlike the case of bilateral diplomacy. In the latter case, the diplomatic agent is accredited to the receiving state in order to perform certain functions of representation and negotiation between the receiving state and his own. That

<sup>42</sup> Official Records of the General Assembly, Twenty-second Session, Supplement No. 9 (A/6709/Rev.1 and Rev.1/Corr.1), p. 23; Yearbook of the International Law Commission, 1967, Vol. II, p. 367.

legal situation is the basis of the institution of *agrément* for the appointment of the head of the diplomatic mission.”<sup>43</sup>

It is also the basis of the right of the receiving state, to request the recall of the diplomatic agent when it declares him *persona non grata*.

#### *Article 48. Facilities for departure*

The host state shall, whenever requested, grant facilities in order to enable persons enjoying privileges and immunities, other than nationals of the host state, and members of the families of such persons irrespective of their nationality, to leave its territory. It shall, in case of emergency, place at their disposal the necessary means of transport for themselves and their property.

#### *Commentary*

(1) Article 48 is based on the provisions of Article 44 of the Vienna Convention on Diplomatic Relations. However, the expression “even in case of armed conflict” has not been included in the present article in view of the decision set out in paragraph 18 of the present report. The Commission has substituted instead the words “whenever requested.” Also, the words “in particular, in case of need,” which appear in Article 44 of the Vienna Convention, have been replaced by the expression “in case of emergency,” in order to emphasize that the host state is under no obligation to put at the disposal of members of the permanent mission means of transportation for travel taking place under normal circumstances.

(2) The Commission considered the possibility of including in the draft, as a counterpart to Article 48, a general provision on the obligation of the host state to allow members of permanent missions to enter its territory to take up their posts. However, the Commission postponed its decision on this matter until the second reading of the draft.

#### *Article 49. Protection of premises and archives*

1. When the permanent mission is temporarily or finally recalled, the host state must respect and protect the premises as well as the property and archives of the permanent mission. The sending state must take all appropriate measures to terminate this special duty of the host state within a reasonable time.

2. The host state, if requested by the sending state, shall grant the latter facilities for removing the property and the archives of the permanent mission from the territory of the host state.

[page 18]

#### *Commentary*

(1) The first sentence of paragraph 1 is based on the provisions of Article 45 of the Vienna Convention on Diplomatic Relations, except as to

<sup>43</sup> Official Records of the General Assembly, Twenty-third Session, Supplement No. 9 (A/7209/Rev.1), p. 11; Yearbook of the International Law Commission, 1968, Vol. II.

the expression "even in case of armed conflict," which has been excluded in view of the decision set out in paragraph 18 of the present report.

(2) The second sentence of paragraph 1 does not appear in Article 45 of the Vienna Convention on Diplomatic Relations. The Commission considered that its addition was needed because of the difference in character between a permanent mission and a diplomatic mission. Following a breach, diplomatic relations are normally resumed after a reasonable period. Withdrawal of a permanent mission to an international organization, on the other hand, may be due to a wide variety of causes and may even be final. The host state is not directly involved in the factors which may determine such a withdrawal or its duration. It would, therefore, mean imposing an unjustified burden on that state to require it to provide, for an unlimited period, special guarantees concerning the premises, archives and property of a permanent mission which has been recalled even on a temporary basis. It was therefore decided in Article 49 that, in case of the recall of its permanent mission, the sending state must terminate this special duty of the host state within a reasonable time. The sending state is free to discharge that obligation in various ways, for instance, by removing its property and archives from the territory of the host state or by entrusting them to its diplomatic mission or to the diplomatic mission of another state. The second sentence of Article 49, paragraph 1, has been drafted in the most general terms in order to cover all these possibilities. The premises similarly cease to enjoy special protection from the time the property and archives situated in them have been withdrawn or, after the expiry of a reasonable period, have ceased to enjoy special protection. Where the sending state has failed to discharge its obligation within a reasonable period, the host state ceases to be bound by the special duty imposed by Article 49, but, with respect to the property, archives and premises, remains bound by any obligations which may be imposed upon it by its municipal law, by general international law or by special agreements.

(3) Paragraph 2 of Article 49 is based on Article 46, paragraph 2 of the draft articles on special missions.

**Article 50.<sup>44</sup> *Consultations between the sending state, the host state and the Organization***

If any question arises between a sending state and the host state concerning the application of the present articles, consultations between the host state, the sending state and the Organization shall be held upon the request of either state or the Organization itself.

*Commentary*

(1) In connexion with the examination of the provisional twenty-one draft articles adopted by the Commission in the course of its twentieth session, suggestions were made by some members of the Commission that

<sup>44</sup> Article 50 was put provisionally at the end of the group of articles adopted by the Commission at its twenty-first session. Its place in the draft as a whole will be determined by the Commission at a later stage.

the Special Rapporteur prepare a provision of general scope of application on the question of consultations between the sending state, the host state and the Organization.<sup>45</sup> The purpose of the consultations in question would be to seek solutions for any difficulties between the host state and the sending state in connexion with the establishment and the activities of the permanent mission. The need for such consultations is underlined by the difficulties which may arise as a result of the non-applicability between states members of international organizations and between states members and the organizations, of rules of inter-state bilateral diplomatic relations regarding *agrément*, the declaring of a diplomatic agent as *persona non grata* and reciprocity.

(2) Article 50 is intended to be sufficiently flexible to envisage the holding of consultations between the sending state and the host state or between either or both of them and the organization concerned. Moreover, the article provides that those consultations shall be held not only upon the request of the states concerned, but also upon the request of the Organization itself. It applies, in particular, to the case where a question arises between the host state on the one hand, and several sending states, on the other. In such a case, all the sending states concerned can participate in the consultations with the host state and the Organization.

(3) As regards the duty of the Organization to ensure the application of the provisions of the present draft, the Commission refers to Article 24.

(4) The provision for consultations is not uncommon in international agreements. It may be found for example in Article IV, section 14, of the Agreement of 26 June 1947 between the United Nations and the United States of America regarding the Headquarters of the United Nations and in Article 6 of the Inter-American Treaty of Reciprocal Assistance of 2 September 1947.<sup>46</sup>

(5) In his fourth report, the Special Rapporteur had proposed the addition to this article, which was then Article 49, of a second paragraph drafted as follows:

"2. The preceding paragraph is without prejudice to provisions concerning settlement of disputes contained in the present articles or other international agreements in force between states or between states and international organizations or to any relevant rules of the Organization."<sup>47</sup>

[page 19] The Commission did not consider it advisable to add this paragraph in view of the terms of Articles 3, 4 and 5 concerning the application

<sup>45</sup> Paragraph (8) of the commentary on Article 16 in the report of the International Law Commission on the work of its twentieth session (Official Records of the General Assembly, Twenty-third Session, Supplement No. 9 (A/7209/Rev.1); Yearbook of the International Law Commission, 1968, Vol. II) and paragraph 5 of the Introduction to the Special Rapporteur's fourth report on relations between states and international organizations (A/CN.4/218 and Add.1).

<sup>46</sup> United Nations, Treaty Series, Vol. 11, p. 12 and *ibid.*, Vol. 21, p. 92. For other examples see Paul Guggenheim, *Traité de droit international public*, Vol. II, 1954, pp. 198-200.

<sup>47</sup> A/CN.4/218/Add.1.

of the relevant rules of international organizations and of international agreements. It also reserved the possibility of including at the end of the draft articles a provision concerning the settlement of disputes which might arise from the application of the articles.

### CHAPTER III

#### SUCCESSION OF STATES AND GOVERNMENTS

##### A. Historical background

20. At its first session, held in 1949, the International Law Commission listed the topic "Succession of States and Governments" among the fourteen selected for codification but did not give priority to its study.<sup>48</sup> Following the adoption by the General Assembly of Resolution 1686 (XVI) of 18 December 1961, entitled "Future work in the field of the codification and progressive development of international law," the International Law Commission in 1962, at its fourteenth session, decided to include "Succession of States and Governments" in its programme of work, in view of the fact that the General Assembly, in sub-paragraph 3 (a) of the above mentioned resolution, had recommended to the Commission to include that topic in its priority list.<sup>49</sup>

21. During its fourteenth session, at the 337th meeting held on 7 May 1962, the Commission set up a Sub-Committee on the Succession of States and Governments, which it entrusted to submit suggestions on the scope of the subject, the method of approach for a study and the means of providing the necessary documentation. The Sub-Committee consisted of the following ten members: Mr. Lachs (Chairman), Mr. Bartoš, Mr. Briggs, Mr. Castrén, Mr. El-Erian, Mr. Elias, Mr. Liu, Mr. Rosenne, Mr. Tabibi and Mr. Tunkin. The Sub-Committee held two private meetings, on 16 May and 21 June 1962. In the light of the Sub-Committee's suggestions, the Commission took some procedural decisions at its 668th and 669th meetings, held on 26 and 27 June 1962. It decided, *inter alia*, to request the Sub-Committee to meet at Geneva in January 1963, in order to continue its work, and to place on the agenda for its fifteenth session the item "Report of the Sub-Committee on Succession of States and Governments."<sup>50</sup> The Secretary-General sent a circular note to the governments of Member States, in accordance with the relevant provisions of the Commission's Statute, inviting them to submit the text of any treaties, laws, decrees, regulations, diplomatic correspondence, etc., concerning the procedure of succession relating to the states which had achieved independence since the

<sup>48</sup> Official Records of the General Assembly, Fourth Session, Supplement No. 10 (A/925), par. 16; Yearbook of the International Law Commission, 1949, p. 281.

<sup>49</sup> Official Records of the General Assembly, Seventeenth Session, Supplement No. 9 (A/5209), par. 60; Yearbook of the International Law Commission, 1962, Vol. II, p. 190.

<sup>50</sup> Official Records of the General Assembly, Seventeenth Session, Supplement No. 9 (A/5209), pars. 54, 55, 70 to 72 and 74; Yearbook of the International Law Commission, 1962, Vol. II, pp. 189-192.

Second World War.<sup>51</sup> By its Resolution 1765 (XVII) of 20 November 1962, the General Assembly recommended that the Commission

"continue its work on the succession of states and governments taking into account the views expressed at the seventeenth session of the General Assembly and the report of the Sub-Committee on the Succession of States and Governments with appropriate reference to the views of states which have achieved independence since the Second World War."

22. The Sub-Committee on the succession of States and Governments met at Geneva from 17 to 25 January 1963 and again on 6 June 1963, at the beginning of the International Law Commission's fifteenth session. On concluding its work, the Sub-Committee approved a report (A/CN.4/160), which appears as annex II to the report of the International Law Commission to the General Assembly on the work of its fifteenth session (1963). The Sub-Committee's report contains its conclusions on the scope of the topic of succession of states and governments and its recommendations on the approach the Commission should adopt in its study. In the *Yearbook of the International Law Commission*, 1963, the Sub-Committee's report is accompanied by its two appendices. Appendix I reproduces the summary records of the meetings held by the Sub-Committee in January 1963 and on 6 June of the same year, and appendix II contains the memoranda and working papers submitted to the Sub-Committee by Mr. Elias (ILC(XIV)SC.2/WP.1 and A/CN.4/SC.2/WP.6), Mr. Tabibi (A/CN.4/SC.2/WP.2), Mr. Rosenne (A/CN.4/SC.2/WP.3), Mr. Castrén (A/CN.4/SC.2/WP.4), Mr. Bartoš (A/CN.4/SC.2/WP.5) and Mr. Lachs (Chairman of the Sub-Committee) (A/CN.4/SC.2/WP.7).<sup>52</sup>

23. The report of the Sub-Committee on the Succession of States and Governments was discussed by the Commission during its fifteenth session (1963), at the 702nd meeting, after being introduced by Mr. Lachs, the Chairman of the Sub-Committee, who explained the Sub-Committee's conclusions and recommendations. The Commission unanimously approved the Sub-Committee's report and gave its general approval to the recommendations contained therein. At the same time, the Commission appointed Mr. Lachs as Special Rapporteur on the topic "Succession of States and Governments." The [page 20] Sub-Committee proposed that the Commission should remind governments of the Secretary-General's circular note referred to above, and the Commission gave instructions to the Secretariat with a view to obtaining further information on the practice of states.<sup>53</sup>

<sup>51</sup> Official Records of the General Assembly, Seventeenth Session, Supplement No. 9 (A/5209), par. 73; Yearbook of the International Law Commission, 1962, Vol. II, p. 192.

<sup>52</sup> Official Records of the General Assembly, Eighteenth Session, Supplement No. 9 (A/5509), annex II; Yearbook of the International Law Commission, 1963, Vol. II, pp. 260-300.

<sup>53</sup> Official Records of the General Assembly, Eighteenth Session, Supplement No. 9 (A/5509), pars. 56-61; Yearbook of the International Law Commission, 1963, Vol. II, pp. 224 and 225.



24. The Commission endorsed the Sub-Committee's view that the objectives should be "a survey and evaluation of the present state of the law and practice in the matter of state succession and the preparation of draft articles on the topic in the light of new developments in international law." Several members emphasized that in view of the modern phenomenon of decolonization, "special attention should be given to the problems of concern to the new states." The Commission considered that "the priority given to the study of the question of state succession was fully justified" and stated that the succession of governments would, for the time being, be considered "only to the extent necessary to supplement the study on state succession." Likewise, the Commission underlined that it was "essential to establish some degree of co-ordination between the Special Rapporteurs on, respectively, the law of treaties, state responsibility, and the succession of states." The Sub-Committee's opinion that succession in the matter of treaties should be "considered in connexion with the succession of states rather than in the context of the law of treaties" was also endorsed by the Commission. The broad outline, the order of priority of the headings and the detailed division of the topic recommended by the Sub-Committee were agreed to by the Commission, it being understood that the purpose was to lay down "guiding principles to be followed by the Special Rapporteur" and that the Commission's approval was "without prejudice to the position of each member with regard to the substance of the questions included in the programme." The headings into which the topic was divided were as follows: (i) succession in respect of treaties; (ii) succession in respect of rights and duties resulting from sources other than treaties; (iii) succession in respect of membership of international organizations.

25. In its Resolution 1902 (XVIII) of 18 November 1963, the General Assembly, noting that the work of codification of the topic of succession of states and governments was proceeding satisfactorily, recommended that the International Law Commission should continue its work on the topic "taking into account the views expressed at the eighteenth session of the General Assembly, the report of the Sub-Committee on the succession of states and governments and the comments which may be submitted by governments, with appropriate reference to the views of states which have achieved independence since the Second World War." Occupied with the codification of other branches of international law, such as the law of treaties and the special missions, the International Law Commission did not consider the topic of the succession of states and governments at its sixteenth (1964), seventeenth (1965/1966) and eighteenth (1966) sessions.<sup>54</sup> In its Resolution 2045 (XX) of 8 December 1965 and 2167 (XXI)

<sup>54</sup> The final draft articles on the law of treaties adopted by the Commission in 1966 did not contain provisions concerning "the succession of States in respect of treaties, which the Commission considers can be more appropriately dealt with under the item of its agenda relating to succession of States and Governments" (Official Records of the General Assembly, Twenty-first Session, Supplement No. 9 (A/6309/Rev.1), part II, par. 30 of the report and par. 6 of the commentary on Article 58 of the draft; Year-

of 5 December 1966, the General Assembly noted with approval the Commission's programme of work referred to in its reports of 1964, 1965 and 1966. Resolution 2045 (XX) recommended that the Commission should continue, "when possible," its work on the succession of states and governments, "taking into account the views and considerations referred to in General Assembly Resolution 1902 (XVIII)." Resolution 2167 (XXI) in turn recommended that the Commission should continue that work "taking into account the views and considerations referred to in General Assembly Resolutions 1765 (XVII) and 1902 (XVIII)."

26. At its nineteenth session (1967), the International Law Commission made new arrangements for the work on the succession of states and governments. The topic was placed on the agenda of the Commission for that session in accordance with a decision taken in 1966.<sup>55</sup> Taking into account the agreed broad outline of the subject laid down in the report submitted by its Sub-Committee in 1963, and the fact that Mr. Lachs, the Special Rapporteur on the topic, had ceased to be a member of the Commission because of his election to the International Court of Justice in December 1966, the Commission, in order to advance its study more rapidly and acting on a suggestion previously made by Mr. Lachs, decided to divide the topic into the three headings mentioned in the Sub-Committee's report (see para. 24 above) and appointed Special Rapporteurs for two of them: Sir Humphrey Waldock, formerly Special Rapporteur of the Commission on the law of treaties, was appointed Special Rapporteur for "succession in respect of treaties" and Mr. Mohammed Bedjaoui, Special Rapporteur for "succession in respect of rights and duties resulting from sources other than treaties." The Commission decided to leave aside, for the time being, the third heading in the division made by the Sub-Committee, namely, "succession in respect of membership of international organizations," which it considered to be related both to succession in respect of treaties and to relations between states and international organizations. Consequently, the Commission did not appoint a Special Rapporteur for this heading.<sup>56</sup>

---

book of the International Law Commission, 1966, Vol. II, pp. 177 and 256). Article 69 of the draft articles on the law of treaties embodied a reservation on this matter. The position of the Commission was in accordance with the decision of principle which it had adopted in 1963 in the context of the topic "Succession of States and Governments" (see paragraph 24 above). However, in the process of codifying the law of treaties reference was made to the succession of states and governments, in 1963, in connexion with the extinction of the international personality of a state and the termination of treaties and, in 1964, with regard to the territorial scope of treaties and the effects of treaties on third states.

<sup>55</sup> Official Records of the General Assembly, Twenty-first Session, Supplement No. 9 (A/6309/Rev.1), part II, par. 74; Yearbook of the International Law Commission, 1966, Vol. II, p. 278.

<sup>56</sup> Official Records of the General Assembly, Twenty-second Session, Supplement No. 9 (A/6709/Rev.1), pars. 38-41; Yearbook of the International Law Commission, 1967, Vol. II, p. 368.

27. With regard to "succession in respect of treaties," the Commission observed that it had already decided in 1963 to give priority to this aspect of the topic, and that the convocation by General Assembly Resolution 2166 (XXI) of 5 December 1966 of a conference on the law of treaties in 1968 and 1969 had made its codification more urgent. The Commission therefore decided to advance its work on that aspect of the topic as rapidly as possible as from its twentieth session in 1968. The Commission considered that the second aspect of the topic, namely, "succession in respect of rights and duties resulting from sources other than treaties," was a diverse and complex matter which would require some preparatory study. It requested the Special Rapporteur for this second aspect of the topic "to present an introductory report which would enable the Commission to decide what parts of the subject should be dealt with, the priorities to be given to them, and the general manner of treatment."

28. The Commission's decisions referred to in paragraphs 26 and 27 above received general support in the Sixth Committee at the General Assembly's twenty-second session. The Assembly, in its Resolution 2272 (XXII) of 1 December 1967, noted with approval the International Law Commission's programme of work for 1968, and repeating the terms of its Resolution 2167 (XXI), recommended that the Commission should continue its work on succession of states and governments, "taking into account the views and considerations referred to in General Assembly Resolutions 1765 (XVII) and 1902 (XVIII)."

29. At its twentieth session (1968), the Commission had before it a first report on "Succession of States in respect of rights and duties resulting from sources other than treaties" (A/CN.4/204) submitted by Mr. Mohammed Bedjaoui, Special Rapporteur on that aspect of the topic, and a first report on "Succession of States and Governments in respect of treaties" (A/CN.4/202) submitted by Sir Humphrey Waldock, Special Rapporteur on succession in respect of treaties. The two reports were considered successively, beginning with the report on succession of states in respect of rights and duties resulting from sources other than treaties.

30. The Commission considered the report (A/CN.4/204) submitted by Mr. Mohammed Bedjaoui, the Special Rapporteur, at its 960th to 965th and 968th meetings. After a general debate on the report the Commission requested the Special Rapporteur to prepare a list of preliminary questions relating to points on which he wished to have the Commission's views. In compliance with that request, the Special Rapporteur submitted to the Commission, at its 962nd meeting, a questionnaire on the following eight points: (a) title and scope of the topic; (b) general definition of state succession; (c) method of work; (d) form of the work; (e) origins and types of state succession; (f) specific problems of new states; (g) judicial settlement of disputes; (h) order of priority or choice of certain aspects of the topic. At its 965th meeting, the Commission provisionally adopted a number of conclusions on the points listed in the Special Rapporteur's questionnaire, pending whatever decisions it might take on succession in respect of treaties. After considering the report (A/CN.4/202)

submitted by Sir Humphrey Waldock, the Commission, at its 968th meeting, reaffirmed the conclusions it had reached concerning succession in respect of matters other than treaties. These conclusions were reproduced in the Committee's report on the session together with a summary of the views expressed by the members of the Commission during the discussion preceding their adoption.<sup>57</sup>

31. The Commission considered the first report on succession of states and governments in respect of treaties (A/CN.4/202) by Sir Humphrey Waldock, the Special Rapporteur, at its 965th to 968th meetings. The Commission endorsed the suggestion of the Special Rapporteur that it was unnecessary to repeat in the context of the Commission's report the general debate which had taken place on the several aspects of succession in matters other than treaties which might also be of interest in regard to succession in respect of treaties. It would be for the Special Rapporteur to take account of the views expressed by members of the Commission in that debate in so far as they might also have relevance in connexion with succession in respect of treaties. The Commission's report reproduced, however, a summary of views expressed on questions such as the title of the topic, the dividing line between the two topics of succession and the nature and form of the work. Following the discussion, the Commission concluded that it was not called upon to take any formal decision in regard to "Succession in respect of treaties."<sup>58</sup>

32. As reflected in the pertinent chapter of the report on the work of its twentieth session, the Commission deemed it desirable, *inter alia*, to complete the study of succession in respect of treaties and to make progress on the study of succession in respect of matters other than treaties during the remainder of the Commission's term of office in its present composition.<sup>59</sup> At the General Assembly's twenty-third session, it was noted with satisfaction that the International Law Commission, following the recommendation of the General Assembly, had begun to consider in depth the topic of succession of states and governments, and that some progress had already been achieved at the Commission's twentieth session. Once again, the General Assembly, in its Resolution 2400 (XXIII) of 11 December 1968, noted with approval the programme of work planned by the International Law Commission and recommended the Commission to continue its work on succession of states and governments "taking into account the views and considerations referred to in General Assembly Resolutions 1765 (XVII) and 1902 (XVIII)."

[page 22] 33. At the present session of the Commission, Mr. Mohammed Bedjaoui, Special Rapporteur on succession in respect of matters other than treaties, submitted a second report (A/CN.4/216/Rev.1) entitled "Economic and financial acquired rights and State succession." Sir Humphrey Waldock, Special Rapporteur on succession in respect of treaties, submitted

<sup>57</sup> Official Records of the General Assembly, Twenty-third Session, Supplement No. 9 (A/7209/Rev.1), pars. 45-79; Yearbook of the International Law Commission, 1968, Vol. II.

<sup>58</sup> *Ibid.*, pars. 80-91.

<sup>59</sup> *Ibid.*, pars. 100, 101, 103 and 104.

also a second report (A/CN.4/214 and Add.1 and 2) on this other aspect of the topic. Owing to the lack of time the Commission considered only the report submitted by Mr. Bedjaoui at the 1000th to 1003rd and 1005th to 1009th meetings.

34. The Secretariat distributed, at the present session of the Commission, a new study in the series "Succession of States to multilateral treaties." The study, the sixth of the series, was entitled "Food and Agricultural Organization of the United Nations: Constitution and multilateral conventions and agreements concluded within the Organization and deposited with its Director-General" (A/CN.4/210).<sup>60</sup>

#### B. Succession in respect of matters other than treaties

35. In 1968, at its twentieth session, the Commission decided to begin its study of succession in respect of matters other than treaties with the aspect of the topic relating to "succession of states in economic and financial matters" and instructed the Special Rapporteur, Mr. Mohammed Bedjaoui, to prepare a report on it for the next session of the Commission.<sup>61</sup> At the present session, as indicated in paragraph 33 above, the Special Rapporteur submitted a report (A/CN.4/216/Rev.1), dealing with the question of "economic and financial acquired rights and state succession" and the Commission devoted nine meetings to its consideration (1000th to 1003rd and 1005th to 1009th meetings). An account is given below of the views expressed by the Special Rapporteur and other members of the

<sup>60</sup> As recorded in paragraph 43 of the Commission's Report on the work of its twentieth session, the Secretariat had previously prepared and distributed, in accordance with the Commission's requests, the following documents and publication relating to succession of states and governments: (a) a memorandum on "The succession of States in relation to membership in the United Nations" (Yearbook of the International Law Commission, 1962, Vol. II, documents A/CN.4/149 and Add.1, p. 101); (b) a memorandum on "Succession of States in relation to general multilateral treaties of which the Secretary-General is the depositary" (*ibid.*, document A/CN.4/150, p. 106); (c) a study entitled "Digest of the decisions of international tribunals relating to State Succession" (*ibid.*, document A/CN.4/151, p. 131); (d) a study entitled "Digest of decisions of national courts relating to succession of States and Governments" (Yearbook of the International Law Commission, 1963, Vol. II, document A/CN.4/157, p. 95); (e) five studies in the series "Succession of States to multilateral treaties," entitled respectively "International Union for the Protection of Literary and Artistic Work: Berne Convention of 1886 and subsequent Acts of revision" (Study I), "Permanent Court of Arbitration and The Hague Conventions of 1889 and 1907" (Study II), "The Geneva Humanitarian Conventions and the International Red Cross" (Study III), "International Union for the Protection of Industrial Property: Paris Convention of 1883 and subsequent Acts of revision and special agreements" (Study IV) and "The General Agreement on Tariffs and Trade and its subsidiary instruments" (Study V) (Yearbook of the International Law Commission, 1968, Vol. II, documents A/CN.4/200 and Add.1 and 2); (f) a volume of the United Nations Legislative Series entitled "Material on Succession of States" (ST/LEG/SER.B/14), containing the information provided or indicated by governments of Member States in response to the Secretary-General's request referred to in paragraphs 21 and 23 above.

<sup>61</sup> Official Records of the General Assembly, Twenty-third Session, Supplement No. 9 (A/7209/Rev.1), par. 79; Yearbook of the International Law Commission, 1968, Vol. II.

Commission during the consideration of the report as well as of the conclusions reached and decisions taken by the Commission at the end of the debate.

1. GENERAL VIEWS ON THE SCOPE, APPROACH AND CONCLUSIONS OF THE REPORT  
SUBMITTED BY THE SPECIAL RAPPORTEUR

33. As reflected in his report, the Special Rapporteur took as his starting-point the principle of equality of states and went on to show that international law does not recognize two categories of states, that of successor state constituting an inferior category. Even if a special status were to be accorded to the successor states, account would nevertheless have to be taken of a number of principles of contemporary international law and relevant resolutions adopted by the United Nations General Assembly which recognized that all peoples are entitled to decide freely their political and economic system.

37. The Special Rapporteur was of the view that acquired rights could not have a legal basis in a transfer of sovereignty from the predecessor state to the successor state entailing a transfer of obligations. There was no transfer but a substitution of sovereignties by the extinction of one and the creation of another. The successor state possessed its own sovereignty as an attribute that international law attached to statehood. On the other hand, a transfer would imply, in his opinion, a change in the character of the obligations themselves, making them more onerous for the successor state. In the light of contradictions in practice, jurisprudence and doctrine, the Special Rapporteur regarded also as neither provable nor useful the thesis that the successor state was obliged to respect acquired rights by virtue of an autonomous obligation of international law. Likewise, he saw a certain inadequacy in the theory of acquired rights as applied to the problems of compensation for derogations therefrom, in particular with regard to acquired rights of aliens. Considering that antinomy existed between decolonization and acquired rights, the Special Rapporteur felt that the theory of acquired rights was even more untenable in the case of newly independent states.

38. Finding no legal basis for the theory of acquired rights and convinced of the highly contradictory nature of the precedents, which needed re-examination, the Special Rapporteur held, in short, that the successor state was not bound by the acquired rights granted by the predecessor state, and that it was so bound only if it acknowledged those rights of its own free will or if its competence was restricted by treaty. But the competence of the successor state was obviously not arbitrary. In its actions, it must not depart at any time from the rules of conduct governing every state. For, before becoming a successor state, it was a state, in other [page 23] words, a legal entity having, in addition to its rights, international obligations the violation of which would engage its international responsibility.

39. The approach and conclusions of the report were supported in principle by some members of the Commission, who found it a complete

presentation of the various trends existing on the subject in practice and theory. Some members agreed with certain of the arguments advanced in the report but deemed it difficult to subscribe without reservation to its conclusions. Thus, it was pointed out that the principle of equality of states is not impaired because a state assumed additional obligations arising out of a valid treaty or from the application of a rule of general international law. Other members, however, disagreed with the content and conclusions of the report because, in their opinion, the issues were not adequately developed, and the presentation of the material was incomplete and somewhat lacking in balance. Express reservations as to the legal analysis of a number of issues dealt with in the report were also made by certain members of the Commission.

40. The Special Rapporteur's views that state succession implied a substitution and not a transfer of sovereignty, that under international law the sovereignty of a successor state was an attribute of its statehood, and that in its actions it was subject to the rules of international law applicable to any state were shared by several members. Some members of the Commission commended the Special Rapporteur on having studied the theory of acquired rights in the light of basic principles of contemporary international law and relevant declarations recently adopted by the General Assembly or by international conferences convened under the auspices of the United Nations. Others thought that those principles were not absolute and sometimes not acceptable and that, consequently, unrestrained discretion could not be allowed to the states invoking them. It was also added that the legal meaning and scope of General Assembly resolutions (e.g. Resolution 1803 (XVII) of 14 December 1962 on permanent sovereignty over natural resources) should be invoked with caution because they reflected a delicate political compromise between Member States, and their interpretation was controversial.

41. The need to study all origins and types of succession in order to formulate appropriate rules was stressed by several members. For some, there were good reasons to place emphasis on decolonization but that type of succession, which would probably require special treatment, did not exhaust the subject. The study should, therefore, cover other causes of succession, such as the establishment and dissolution of unions, mergers, partitions and partial transfers of territory. Other members thought that the process of succession arising from decolonization should not be studied exclusively from the standpoint of the relationship between the predecessor and the successor states because relations with third states or among the successor states themselves (dissolution of colonial federations) could be likewise at stake. Some members were of the opinion that decolonization was more a cause than a type of succession. Considering that decolonization had reached a very advanced stage, other members said that the Commission should focus its attention on the causes of succession which might become more frequent in the future (e.g. establishment of and secession from economic integrations and federal unions). Lastly, some members emphasized that the circumstances surrounding certain cases of succession,

in particular cases of independence resulting from a freely accepted agreement, should not be overlooked.

42. In this connexion, the Special Rapporteur stated that, in his view, decolonization was not a momentary phenomenon which came to an end simply because independence was attained, but rather a lengthy process during which the structural changes involved had to be examined in the specific context of state succession. This view was shared by some members of the Commission, while others took a different view.

## 2. THE SUCCESSION OF STATES AND THE PROBLEM OF ACQUIRED RIGHTS

43. Some members of the Commission agreed with the Special Rapporteur's understanding that contemporary international law did not recognize so-called acquired rights in connexion with private persons, individuals or corporate bodies. The right of property has always been relative and subject to changes, and international law has allowed states to nationalize the property of aliens and nationals alike. Other members also considered juridically correct the thesis of the non-existence of a rule of international law on which acquired rights would be based but, at the same time, recognized that for political reasons certain elements of the concept had sometimes been applied in practice, or that it might occasionally help to solve some specific problems (e.g. debts of public utility, cases relating to certain types of private rights). With regard to certain public rights, it was pointed out that, where succession resulted from other causes than decolonization, certain rights of states (e.g., public property, public debts) deserved protection, and that the legal means of safeguarding them should be studied.

44. In the opinion of other members, the notion of acquired rights had been recognized in international practice and jurisprudence and in treaties and must be respected in cases of succession. Such rights might be not absolute, their concept might be somewhat imprecise, and they could be limited, but it was not possible to accept their outright suppression. The successor state must, like its predecessor, respect a minimum of rights of aliens (e.g. the right to property), including certain acquired rights; where appropriate, international law supported such respect of acquired rights by imposing an obligation to pay compensation. Exceptions to that principle were only admitted where the predecessor state had granted the rights in bad faith, where such rights were not in conformity with the public and social order of the successor state, and where the maintenance of the rights in question was contrary to the general interest. It was also added by some members that acquired rights obtained by illegal means were not protected by international law.

[page 24] 45. Certain members considered it impossible either to reject the concept of acquired rights or to accept it without any qualifications. It had been recognized in the past by international jurisprudence as a rule of customary international law, but the position had shifted since then. At present, the concept was highly controversial. The Commission's task was not to engage in a doctrinal debate on the existence or non-existence of



acquired rights, but to consider whether or not it was essential that, even in the case of state succession, aliens should be guaranteed the treatment accorded to them by international law.

46. It was also mentioned that no legal system could allow itself to reject all transitional rights. There could not be automatic extinction of all rights. The successor state were [was], by virtue of the rules governing state succession, under an obligation to respect those rights as long as no change of régime was introduced in its legal order, that change being, of course, subject to any limits laid down by the rules of international law.

47. For some members of the Commission, compensation was the remedy provided for by international law to reconcile the principle of acquired rights and the principle of the sovereign equality of states. Among the reasons advanced were the principles of unjust enrichment and equity. States had the right to nationalize or expropriate property rights which had the character of acquired rights, but the exercise of that right carried with it the obligation to pay compensation. Certain members referred to prompt, adequate and effective compensation. Others said that the compensation should be equitable, should be fixed according to the circumstances, and should take into consideration the capacity of the successor state to pay. While recognizing in principle the obligation to pay compensation, certain members excluded its automatic application in certain situations derived from some specific causes of succession.

48. On the other hand, other members were of the opinion that international law did not limit the sovereignty of the state in that respect, even though, for reasons of political or economic expediency, equitable compensation had been sometimes granted in practice, by agreement or otherwise. Some of them believed that in this matter a distinction should be made between large landowners or corporations and private individuals of modest means. Only the latter should in certain cases receive reasonable compensation for reasons of humanity and equity.

49. Lastly, other members noted that the present trend was to have recourse to global settlements by international arrangements or agreements. It was also suggested that the problem of compensation should be approached in the light of the modern principles of international economic co-operation between developing and developed countries.

50. The principles of international law concerning unjust enrichment, human rights, good faith and equity were frequently mentioned during the debate as possible legal foundations for the protection of rights existing prior to the succession. Thus, it was said that the abolition by a successor state of certain economic and financial rights could involve an unjust enrichment, that the rules regarding human rights protected certain essential rights of aliens and nationals, including property rights, that good faith was at stake where investments were covered by formal or *de facto* agreements, and that equity could serve to remedy certain situations.

51. The Special Rapporteur for his part considered that in practice the notion of unjust enrichment would not be applicable in the context of decolonization, if only because, if applied, it would give rise to court cases

which would not serve the cause of good relations between the predecessor and the successor states. As far as human rights were concerned, he voiced the opinion that present differences between the individualist and collectivist standpoints might also prove a source of difficulty. The notion of good faith was, in his view, too vague to be adopted as a basis. The Special Rapporteur's position on these points was the subject of lively controversy in the Commission.

3. ECONOMIC AND FINANCIAL ACQUIRED RIGHTS AND SPECIFIC PROBLEMS  
OF NEW STATES

52. Some members underlined that in cases of decolonization the starting-point should be that all so-called economic and financial acquired rights were void. In their view, the right of new states, as of all other states, to nationalize and exploit their natural resources in the way they believed most appropriate for their economic development should not be jeopardized. On the other hand, investments made during the colonial period had frequently been amortized long before independence and had paid off very often the equivalent of several times their value.

53. Other members considered that decolonization and respect for acquired rights were not necessarily contradictory. In their view, if the facts were that the respect of economic and financial acquired rights in a new state which was a former colony constituted a severe limitation on its economic development, this should be taken into account and appropriate remedies should be devised. Certain members affirmed that in the absence of particular agreements, the principle of the respect of acquired rights remained valid, even in cases of succession resulting from decolonization.

54. Other members shared the view that compensation and terms of payment for expropriation of property should be calculated so as to take into account losses suffered by the former colony in connexion with that property. Benefits derived in the past under the colonial régime would have to be taken into consideration to avoid unjust enrichment.

55. Stress was laid on the difficulties which might arise in cases of decolonization where an enormous volume of rights became aliens' rights overnight. In such cases the rules governing compensation were impracticable and should be replaced by equitable solutions based on international solidarity and economic cooperation. Once the decolonization process had been completed and there was again an equitable participation in economic and social progress in all continents, and flagrant inequalities had been remedied, the general rules of international law governing compensation would be seen in their normal perspective.

[page 25] 56. Lastly, certain members considered it important to ascertain what the economic and financial consequences might be of the maintenance, discontinuance or modification of the principle of acquired rights. In their view, large scale nationalization without compensation might adversely affect new states and developing countries by hindering the international assistance necessary for their economic development. On the other hand, equitable protection of economic and financial acquired

rights could encourage foreign capital investment and technical assistance. Other members said that in this field not only legal but also economic and political factors should be taken into consideration in order to avoid reactions detrimental to the developing countries. Contemporary realities should be faced and acceptable safeguards and settlement procedures worked out.

4. SUCCESSION IN ECONOMIC AND FINANCIAL MATTERS AS A QUESTION OF CONTINUITY OR DISCONTINUITY OF LEGAL SITUATIONS EXISTING PRIOR TO THE SUCCESSION

57. In the opinion of some members the essential question was to ascertain the extent to which a successor state was bound to respect pre-existing legal situations (rights and obligations) lawfully constituted on the basis of the legal order of the predecessor state in respect of the territory which became that of the successor state. In other words, the problem was to find out in what situations, in the absence of a specific treaty régime, the very fact that a state had succeeded another introduced an element that authorized the successor to derogate from the general rules of international law applicable to those situations before the succession. The codification of the international law relating to succession in economic and financial matters would consist, for those members, in determining the possible exceptions to the general principle of the equality of rights and obligations of the predecessor and the successor states with regard to those legal situations. The Special Rapporteur and certain members deemed it reasonable to believe that the obligations of the successor state would be lessened because it had not participated in creating them (*res inter alios acta*).

5. RELATIONSHIP BETWEEN SUCCESSION IN ECONOMIC AND FINANCIAL MATTERS, THE RULES GOVERNING THE TREATMENT OF ALIENS AND THE TOPIC OF STATE RESPONSIBILITY

58. It was generally agreed that problems relating to the protection of aliens and of their acquired rights arose both in connexion with state succession and in other contexts. The Special Rapporteur commented that it was not a question of determining whether or not those problems arose exclusively in connexion with state succession, but whether they arose at the same time, and on the same terms, in the framework of succession in economic and financial matters. He considered that problems relating to the treatment of aliens would have to be dealt with specifically in the context of state succession.

59. Reference was made during the debate by certain members to matters such as the equal treatment of nationals and aliens, to the obsolescence of the distinction between nationals and aliens with respect to the protection of certain rights, to the desirability of giving separate treatment to economic and financial rights of individuals and to those which belonged to corporate bodies, to the difficult questions of nationality which arose from decolonization, and to the need of a reassessment of the notion of the

"international minimum standard" in the light of present principles and rules of positive international law.

60. Some members took the view that the study of acquired rights belonged to the topic of state responsibility rather than to that of succession in economic and financial matters. Others considered that it could be studied either in the context of state succession or in that of state responsibility, or separately. The Special Rapporteur for the topic of succession in respect of matters other than treaties stated that succession was concerned only with the existence or non-existence of international obligations, namely with the question of what a successor state could or could not legally do, while state responsibility, as defined by the Special Rapporteur for that topic, dealt with the problems arising out of the violation of existing rules.

#### 6. CONCLUSIONS AND DECISIONS OF THE COMMISSION

61. At the end of the debate, most members of the Commission were of the opinion that the codification of the rules relating to succession in respect of matters other than treaties should not begin with the preparation of draft articles on acquired rights. The topic of acquired rights was extremely controversial and its study, at a premature stage, could only delay the Commission's work on the topic as a whole. The efforts of the Commission should, therefore, be directed to finding a solid basis on which to go forward with the codification and progressive development of the topic, taking into account the differing legal interests and current needs of states. Consequently, most members of the Commission considered that an empirical method should be adopted for the codification of succession in economic and financial matters, preferably commencing with a study of public property and public debts. Not until the Commission had made sufficient progress, or perhaps had even exhausted the entire subject, would it be in a position to deal directly with the problem of acquired rights.

62. Referring to the provisional decision adopted at its 1009th meeting and to paragraph 93 of this report, the Commission requested the Special Rapporteur to prepare another report containing draft articles on succession of states in respect of economic and financial matters, taking into account the comments of members of the Commission on the reports he had already submitted at the Commission's twentieth and twenty-first sessions. The Commission took note of the Special Rapporteur's intention to devote his next report to public property and public debts. It thanked the Special Rapporteur for his second report on succession of states in respect of matters other than treaties, and confirmed its decision to give that topic priority at its twenty-second session, in 1970.

[page 26] 63. At the request of the Special Rapporteur, the Commission decided to ask the Secretary-General to circulate again a note inviting governments of Member States to submit the texts of any treaties, laws, decrees, regulations and diplomatic correspondence relating to the process of succession and affecting states which have attained their independence since the Second World War, which had not been transmitted pursuant to the Secretary-General's notes of 27 July 1962 and 15 July 1963, as well as

any additional documentation evidencing the practice followed by states in that respect. The Secretariat will compile and publish the information received in a volume of the United Nations Legislative Series. Further, the Secretariat will bring up to date the "Digest of the decisions of international tribunals relating to state succession" (A/CN.4/151), published in 1962.

#### CHAPTER IV

##### STATE RESPONSIBILITY

64. At its first session in 1949, the International Law Commission included "State responsibility" in the list of fourteen topics of international law selected for codification.<sup>62</sup> The Commission, however did not give priority to the study of the topic. By Resolution 799 (VIII) of 7 December 1953, the General Assembly requested the Commission "as soon as it considers it advisable, to undertake the codification of the principles of international law governing State responsibility."

65. At its sixth session (1954), the International Law Commission took note of General Assembly Resolution 799 (VII). However, because of its heavy agenda, the Commission was unable to begin the study of the topic at that session.<sup>63</sup> The Commission had before it a memorandum (A/CN.4/80) on the request of the General Assembly submitted by one of its members, Mr. F. V. García-Amador.<sup>64</sup> The memorandum described the background of the General Assembly's request, the nature and scope of the matter and a plan of work. In 1955, at its seventh session, the Commission appointed Mr. F. V. García-Amador Special Rapporteur for the topic of state responsibility.<sup>65</sup>

66. Mr. F. V. García-Amador, Special Rapporteur, submitted successively six reports on the topic to the Commission at its eighth (1956), ninth (1957), tenth (1958), eleventh (1959), twelfth (1960) and thirteenth (1961) sessions. The first report (A/CN.4/96), a preliminary one, was entitled "International Responsibility" and contained some "bases of discussion."<sup>66</sup> The second report (A/CN.4/106) added to the title the following subheading "Responsibility of the state for injuries caused in its terri-

<sup>62</sup> Official Records of the General Assembly, Fourth Session, Supplement No. 10 (A/925), par. 16; Yearbook of the International Law Commission, 1949, p. 281. The Commission made the selection after undertaking a survey of the whole field of international law, in accordance with Article 18, paragraph 1, of its Statute. In this connexion, the Commission used as a basis of discussion a memorandum by the Secretary-General entitled "Survey of International Law in relation to the work of Codification of the International Law Commission" (A/CN.4/1/Rev.1).

<sup>63</sup> Official Records of the General Assembly, Ninth Session, Supplement No. 9 (A/2693), par. 74; Yearbook of the International Law Commission, 1954, Vol. II, p. 162.

<sup>64</sup> Yearbook of the International Law Commission, 1954, Vol. II, p. 21.

<sup>65</sup> Official Records of the General Assembly, Tenth Session, Supplement No. 9 (A/2934), par. 33; Yearbook of the International Law Commission, 1955, Vol. II, p. 42.

<sup>66</sup> Yearbook of the International Law Commission, 1956, Vol. II, p. 173.

tory to the person or property of aliens. Part I: Acts and Omissions" and contained a set of preliminary draft articles on that aspect of the topic.<sup>67</sup> All the reports which followed were equally limited to the study of questions relating to responsibility of the state for injuries caused in its territory to the person or property of aliens. The third report (A/CN.4/111) related to "Part II: The International Claim" contained also a set of preliminary draft articles,<sup>68</sup> the fourth (A/CN.4/119) undertook a new and more detailed study of certain questions already dealt with in the second report (international protection of acquired rights; expropriation in general; contractual rights)<sup>69</sup> and the fifth (A/CN.4/125), divided into three parts, continued the study made in the fourth report of measures affecting acquired rights, examined the problem of the constituent elements of the wrongful act, including "abuse of rights" and "fault," and revised the preliminary draft articles contained in the second and third reports.<sup>70</sup> The sixth and last report (A/CN.4/134 and Add.1) was devoted to the subject of "reparation of the injury." It included also an addendum containing revised texts of the preliminary draft articles submitted by the Special Rapporteur in his previous reports.<sup>71</sup>

67. Occupied with the codification of other branches of international law, such as arbitral procedure and diplomatic and consular intercourse and immunities, the Commission was not able between 1956 and 1961 to undertake the codification of state responsibility, al[page 27]though from time to time it held some general exchanges of views on the matter. Thus, at its eighth session (1956), the Commission considered the first report submitted by the Special Rapporteur, Mr. F. V. García-Amador, and without taking any decision on particular points raised therein requested him to continue his work in the light of the views expressed by the members.<sup>72</sup> At its ninth session (1957), the Commission limited itself to a general and preliminary discussion of the second report of the Special Rapporteur and requested again the Special Rapporteur to continue his work.<sup>73</sup> In 1959, at its eleventh session, the Commission held a brief discussion on state responsibility almost entirely devoted to comment on a preliminary report from representatives of the

<sup>67</sup> Yearbook of the International Law Commission, 1957, Vol. II, p. 104.

<sup>68</sup> Yearbook of the International Law Commission, 1958, Vol. II, p. 47.

<sup>69</sup> Yearbook of the International Law Commission, 1959, Vol. II, p. 1.

<sup>70</sup> Yearbook of the International Law Commission, 1960, Vol. II, p. 41.

<sup>71</sup> Yearbook of the International Law Commission, 1961, Vol. II, p. 1. Although the sixth report was among the documents prepared for the Commission's thirteenth session, it was only submitted in December 1961, that is after the closure of the session. As the term of office of the Commission's members ended at 31 December 1961 and Mr. García-Amador was not re-elected, he submitted that report to the Commission, so that his contribution to the work of codification in the field of state responsibility should not remain incomplete.

<sup>72</sup> Official Records of the General Assembly, Eleventh Session, Supplement No. 9 (A/3159), par. 35; Yearbook of the International Law Commission, 1956, Vol. II, p. 301. The discussion took place at the 370th to 373rd meetings of the Commission.

<sup>73</sup> Official Records of the General Assembly, Twelfth Session, Supplement No. 9 (A/3623), par. 17; Yearbook of the International Law Commission, 1957, Vol. II, p. 143. The discussion took place at its 413th to 416th meetings.

Harvard Law School on the work undertaken by that School on the subject.<sup>74</sup> At its twelfth session (1960), the Commission heard and its members commented briefly on, first, a statement on the problems of state responsibility made by the Observer for the Inter-American Juridical Committee, and, secondly, a new statement by the representative of the Harvard Law School.<sup>75</sup> In 1961, at its thirteenth session, the Commission heard another statement by the representative of the Harvard Law School on the draft convention on the international responsibility of states for injury to aliens, prepared as part of the programme of international studies of the Harvard Law School.<sup>76</sup>

68. In 1960, during the consideration of the International Law Commission's report on the work of its twelfth session, the question of the codification of state responsibility was raised in the Sixth Committee of the General Assembly for the first time since 1953. Different views having been expressed on the principles governing state responsibility and its codification, as well as with regard to the codification of other topics of international law, the General Assembly by its Resolution 1505 (XV) of 12 December 1960 decided to place the question "Future work in the field of the codification and progressive development of international law" on the provisional agenda of its sixteenth session and invited Member States to submit in writing any views or suggestions they might have on that question. Following the adop-

<sup>74</sup> Official Records of the General Assembly, Eleventh Session, Supplement No. 9 (A/4169), par. 7; Yearbook of the International Law Commission, 1959, Vol. II, p. 88. The discussion took place at its 512th and 513th meetings. In connexion with the preliminary work of the Commission for the study of the principles governing state responsibility, the Harvard Law School Research Center had decided, at the request of the Commission's Secretariat, to revise and bring up to date the "Draft Convention on responsibility of states for damages done in their territory to the person or property of foreigners" prepared by the Center in 1929. The Commission, at its eighth session (1956), confirmed the request of the Secretariat (Yearbook of the International Law Commission, 1956, Vol. I, 370th meeting, pars. 16-18, p. 228).

<sup>75</sup> Official Records of the General Assembly, Fifteenth Session, Supplement No. 9 (A/4425), pars. 7 and 44; Yearbook of the International Law Commission, 1960, Vol. II, pp. 144 and 181. The Commission considered the statements at its 566th and 568th meetings. The Inter-American Council of Jurists and its permanent committee, the Inter-American Juridical Committee, had been requested by the Tenth Inter-American Conference (1954) to prepare a study or report on the contribution of the American Continent to the principles of international law that govern the responsibility of the state. The Inter-American Juridical Committee adopted, in 1961, a report setting out the principles which the Latin American countries considered to be applicable in the matter. The Inter-American Council of Jurists, at its fifth session held at San Salvador in 1965, adopted a resolution on the subject recalling the principles stated in the Committee's report and declaring that they presented the Latin American contribution to the principles of international law that govern the responsibility of the state. The resolution requested the Committee to prepare a supplementary report on the contribution of the United States of America. In 1965, the Inter-American Juridical Committee prepared a second report setting out the principles of international law that govern the responsibility of the state in the opinion of the United States of America.

<sup>76</sup> Official Records of the General Assembly, Sixteenth Session, Supplement No. 9 (A/4843), par. 46; Yearbook of the International Law Commission, 1961, Vol. II, p. 129. The Commission heard the statement at its 613th meeting.

tion of the above-mentioned General Assembly resolution, the International Law Commission, at its thirteenth session (1961), had a general discussion on the planning of its future work in the light of the debate which had taken place in the Sixth Committee of the General Assembly. During that discussion, the question of the work to be done on the topic of state responsibility was raised. All the members of the Commission who spoke on the subject believed that it should be included among the priority topics. There were again differences of opinion, however, regarding the approach to the subject, and in particular as to whether the Commission should begin by codifying the general rules governing state responsibility, or whether it should codify at the same time the rules whose violation entailed international responsibility.<sup>77</sup>

69. At the sixteenth session of the General Assembly, in 1961, the Sixth Committee discussed the question of future work in the field of the codification and progressive development of international law. After that discussion the General Assembly by Resolution 1686 (XVI) of 18 December 1961 recommended the International Law Commission, in sub-paragraph 3 (a) of the resolution, to continue, *inter alia*, its work in the field of state responsibility and, in sub-paragraph 3 (b), to consider at its fourteenth session its future programme of work "on the basis" of sub-paragraph 3 (a) of the resolution "and in the light of the discussion in the Sixth Committee at the fifteenth and sixteenth sessions of the General Assembly and of the observations of Member States submitted pursuant to Resolution 1505 (XV), and to report to the Assembly at its seventeenth session on the conclusions it has reached."

70. In pursuance of General Assembly Resolution 1686 (XVI), the International Law Commission considered its future programme of work at its fourteenth session [page 28] (1962), at the 629th to 637th and 668th and 669th meetings. On the recommendation of a Committee set up by the Commission, it was agreed, in accordance with sub-paragraph 3 (a) of Resolution 1686 (XVI), to include "State responsibility" in the future programme of work of the Commission as one of the three main topics under study out of the seven listed in the approved programme.<sup>78</sup> During the discussion, the opinion that state responsibility should be included among the priority topics was shared by all members of the Commission. It was pointed out, however, that as Mr. García-Amador was no longer a member of the Commission, and as his reports had not been discussed or approved by the Commission, it was not merely a question of continuing work already begun on the topic of state responsibility, as recommended by the General Assembly, but of taking up the subject *ex novo*. There were divergent

<sup>77</sup> Official Records of the General Assembly, Sixteenth Session, Supplement No. 9 (A/4843), pars. 40 and 41; Yearbook of the International Law Commission, 1961, Vol. I, pp. 206-223, and Vol. II, pp. 128 and 129. The general debate took place at the 614th to 616th meetings of the Commission.

<sup>78</sup> Official Records of the General Assembly, Seventeenth Session, Supplement No. 9 (A/5209), pars. 57-63; Yearbook of the International Law Commission, 1962, Vol. II, pp. 190 and 191.



views, however, concerning the best approach to the study of the question and the issues which the study should cover as well as different opinions concerning the method of work which should be adopted for the codification of the topic. As a result of the discussion, the Commission agreed that it would be necessary to undertake preparatory work before a special rapporteur was appointed. Accordingly, at its 637th meeting on 7 May 1962, the Commission decided to set up a Sub-Committee consisting of the following ten members: Mr. Ago (Chairman), Mr. Briggs, Mr. Gros, Mr. Jiménez de Aréchaga, Mr. Lachs, Mr. de Luna, Mr. Paredes, Mr. Tsuruoka, Mr. Tunkin and Mr. Yasseen. The Sub-Committee held a private meeting, on 21 June 1962, and submitted some suggestions which were considered by the Commission at its 668th meeting on 26 June 1962. In the light of those suggestions, the Commission adopted the following decisions: (a) the Sub-Committee was to meet at Geneva from 7 to 16 January 1963; (b) its work was to be devoted primarily to the general aspects of state responsibility; (c) the members of the Sub-Committee was [were] to prepare for it specific memoranda relating to the main aspects of the subject; (d) the Chairman of the Sub-Committee was to prepare a report on the results of its work to be submitted to the Commission at its next session. Accordingly, the Commission, at its 669th meeting, decided to include an item entitled "Report of the Sub-Committee on State Responsibility" in the agenda of its fifteenth session.<sup>79</sup>

71. The General Assembly, at its seventeenth session, noting that the International Law Commission had established a Sub-Committee on State Responsibility to study the scope of and approach to the topic and that the work of the Sub-Committee was to be devoted primarily to the general aspects of the topic, recommended the Commission in its Resolution 1765 (XVII) of 20 November 1962 to "continue its work on state responsibility, taking into account the views expressed at the seventeenth session of the General Assembly and the report of the Sub-Committee on State Responsibility and giving due consideration to the purposes and principles enshrined in the Charter of the United Nations." This recommendation was shortly to be confirmed in the declaration contained in part II of Resolution 1803 (XVII) on "Permanent sovereignty over natural resources," adopted by the General Assembly on 14 December 1962, on the recommendation of the Second Committee. In that declaration, the Assembly stated that it "welcomes the decision of the International Law Commission to speed up its work on the codification of the topic of responsibility of states for the consideration of the General Assembly."<sup>80</sup>

<sup>79</sup> Official Records of the General Assembly, Seventeenth Session, Supplement No. 9 (A/5209), pars. 33-56 and 67-69; Yearbook of the International Law Commission, 1962, Vol. II, pp. 188, 189 and 191.

<sup>80</sup> This recommendation followed the request contained in a passage of operative paragraph 8 of Resolution I A annexed to the report submitted in 1961 by the "Commission on Permanent Sovereignty over Natural Resources." This report is printed in a publication (A/AC.97/5/Rev.2; E/3511; A/AC.97/13) (United Nations publication, Sales No.: 62.V.6), which also contains the Secretariat study on "The status of perma-

72. The Sub-Committee on State Responsibility held seven meetings during its 1963 January session. All its members were present, with the exception of Mr. Lachs, who was absent because of illness. The Sub-Committee had before it memoranda prepared by the following members: Mr. Jiménez de Aréchaga (ILC (XIV) SC.1/WP.1); Mr. Paredes (ILC (XIV) SC.1/WP.2 and Add.1, A/CN.4/SC.1/WP.7); Mr. Gros (A/CN.4/SC.1/WP.3); Mr. Tsuruoka (A/CN.4/SC.1/WP.4); Mr. Yasseen (A/CN.4/SC.1/WP.5); Mr. Ago (A/CN.4/SC.1/WP.6). The Sub-Committee held a general debate on the questions to be studied in connexion with the work relating to the international responsibility of states, and with the directives to be given by the Commission to the Special Rapporteur on that topic. The Sub-Committee agreed unanimously to recommend that the Commission should, with a view to the codification of the topic, give priority to the definition of the general rules governing the international responsibility of the state. It was agreed, firstly, that there would be no question of neglecting the experience and material gathered in certain special sectors, specially that of responsibility for injuries to the person or property of aliens; and, secondly, that careful attention should be paid to the possible repercussions which new developments in international law may have had on responsibility.<sup>81</sup>

73. Having reached this general conclusion, the Sub-Committee discussed in detail an outline programme of [page 29] work submitted by Mr. Ago and decided unanimously to give the Commission some indications as to the main points to be taken into consideration in connexion with the general aspects of the international responsibility of the state. These indications, which would serve as a guide to the work of a future special rapporteur to be appointed by the Commission, referred to the following points: (a) definition of the concept of the international responsibility of the state; (b) origin of international responsibility (international wrongful act; determination of the components parts of the international wrongful act, including the objective element and the subjective element; the various kinds of violations of international obligations; and circumstances in which an act is not wrongful); (c) the forms of international responsibility (the duty to make reparation; reparation; different forms of sanctions). The Sub-Committee suggested that the question of the responsibility of subjects of international law other than states, such as international organizations, should be left aside.

---

ment sovereignty over natural wealth and resources," of which Chapter III gives a useful survey of international jurisprudence and codification drafts on the responsibility of the state for the property of aliens and contracts concluded by them (pars. 1-179).

<sup>81</sup> The Report (A/CN.4/152) by Mr. Ago, Chairman of the Sub-Committee on State Responsibility, approved by the Sub-Committee, was appended as annex I to the report of the International Law Commission on the work of its fifteenth session (1963) (Official Records of the General Assembly, Eighteenth Session, Supplement No. 9 (A/5509); Yearbook of the International Law Commission, 1963, Vol. II, pp. 227 and 228). The Yearbook of the International Law Commission, 1963, Vol. II, reproduced also, in pages 228 to 259, the summary records of the second to fifth meetings of the Sub-Committee as well as the memoranda submitted by the members of the Sub-Committee.

74. The work of the Sub-Committee on State Responsibility was reviewed by the International Law Commission at its 686th meeting, held during its fifteenth session (1963), on the basis of the report (A/CN.4/152) submitted by the Chairman of the Sub-Committee, Mr. Roberto Ago. All the members of the Commission who took part in the discussion agreed with the general conclusions recommended by the Sub-Committee. The members of the Commission also approved the programme of work proposed by the Sub-Committee without prejudice to their position on the substance of the questions set out in that programme. In this connexion, it was pointed out that these questions were intended solely to serve as a guide for the Special Rapporteur in his substantive study of specific aspects of the formulation of the general rules governing the international responsibility of states. After having unanimously approved the report of the Sub-Committee, the Commission appointed Mr. Roberto Ago as Special Rapporteur for the topic of state responsibility. It was also agreed that the Secretariat would prepare some working papers on the topic.<sup>82</sup>

75. The report of the International Law Commission on the work of its fifteenth session was considered by the Sixth Committee during the eighteenth session of the General Assembly. The conclusions reached by the Commission on the codification of state responsibility were generally approved. By its Resolution 1902 (XVIII) of 18 November 1963, the General Assembly recommended the International Law Commission to "continue its work on state responsibility, taking into account the views expressed at the eighteenth session of the General Assembly and the report of the Sub-Committee on State Responsibility and giving due consideration to the purposes and principles enshrined in the Charter of the United Nations." Owing, however, to the fact that the term of office of the members of the Commission would expire at the end of 1966, and that it was desirable to complete, by that date, the study of the topics which were already in an advanced state, the Commission decided to devote its 1964, 1965 and 1966 sessions to the completion of the work on the law of treaties and special missions, and not to begin its consideration of the substance of the question of state responsibility until it had completed its study of those other topics.<sup>83</sup> The General Assembly, in its Resolution 2045 (XX) of 8 December 1965, recommended the Commission to continue, "when possible," its work on state responsibility "taking into account the views and considerations referred to in General Assembly Resolution 1902 (XVIII)" and, in its Resolution 2167 (XXI) of 5 December 1966, to continue its work on state responsibility "taking into account the views and considerations referred to in General Assembly Resolutions 1765 (XVII) and 1902 (XVIII)."

76. In 1967, at its nineteenth session, the Commission had before it a note (A/CN.4/196) on state responsibility submitted by Mr. Roberto Ago,

<sup>82</sup> Official Records of the General Assembly, Eighteenth Session, Supplement No. 9 (A/5509), pars. 51-55; Yearbook of the International Law Commission, 1963, Vol. II, pp. 223 and 224.

<sup>83</sup> Official Records of the General Assembly, Nineteenth Session, Supplement No. 9 (A/5809), par. 36; Yearbook of the International Law Commission, 1964, Vol. II, p. 226.

Special Rapporteur. Since the membership of the Commission had been altered as a result of the election which took place in the General Assembly in 1966, the Special Rapporteur expressed the wish that the Commission as newly constituted, should confirm the instructions given to him in 1963. The Commission confirmed these instructions and noted with satisfaction that Mr. Ago will submit an initial report on the topic at the twenty-first session of the Commission.<sup>84</sup> At the twenty-second session of the General Assembly, the hope was expressed in the Sixth Committee that the Commission would finally be in a position to make progress with the topic of state responsibility. The General Assembly accordingly recommended, in its Resolution 2272 (XXII) of 1 December 1967, that the Commission should "expedite the study of the topic of state responsibility." At its twentieth session (1968), the International Law Commission proceeded to a review of its programme of work as decided by it in 1967, and taking into consideration General Assembly Resolution 2272 (XXII), stressed that a special effort should be made in order to do substantive work on state responsibility at the 1969 session of the Commission.<sup>85</sup> The General Assembly by its Resolution 2400 (XXIII) of 11 December 1968 recommended the Commission to "make every effort to begin substantive work on state responsibility as from its next session, taking into account the views and considerations referred to in General Assembly Resolutions 1765 (XVII) and 1902 (XVIII)."

77. In conformity with the decision taken by the Commission referred to in paragraph 74 above, the Secretariat published in 1964, as documents of the six-[page 30]teenth session of the International Law Commission, the following documents relating to the topic of state responsibility:<sup>86</sup> (a) a working paper containing a summary of the discussions in various United Nations organs and the resulting decisions (A/CN.4/165); (b) a digest of the decisions of international tribunals relating to state responsibility (A/CN.4/169). At the present session of the Commission, the Secretariat published a supplement (A/CN.4/209) to the working paper and a supplement (A/CN.4/208) to the digest.

78. At the present session of the Commission Mr. Roberto Ago, Special Rapporteur, submitted his first report on state responsibility (A/CN.4/217). This report, entitled "Review of previous work on codification of the topic of the international responsibility of states," gives a general description of the codification work undertaken on the subject by the United Nations, individual scholars, learned societies, regional bodies and the League of Nations. The most important texts prepared in the course of that earlier codification work were reproduced as annexes to the report for the conveni-

<sup>84</sup> Official Records of the General Assembly, Twenty-second Session, Supplement No. 9 (A/3709/Rev.1 and Rev.1/Corr.1), par. 42; Yearbook of the International Law Commission, 1967, Vol. II, p. 368. The Commission considered the note at its 934th and 953th meetings. The note is reproduced in Yearbook of the International Law Commission, 1967, Vol. II, p. 325.

<sup>85</sup> Official Records of the General Assembly, Twenty-third Session, Supplement No. 9 (A/7209/Rev.1), par. 101.

<sup>86</sup> Yearbook of the International Law Commission, 1964, Vol. II, pp. 125-171.

ence of the members of the Commission. The main purpose of this first report was to give the Commission, at the start of its substantive work on the topic of state responsibility, a full account of the work which had been done on the subject in the past and which could still be of great use in certain cases. At the same time this first report was intended to bring out, in historical perspective, some of the main obstacles which have hitherto frustrated all attempts to codify the topic, thus drawing attention to certain risks which must be avoided if the new undertaking was to succeed.

79. The Commission examined the report at its 1011th to 1013th meetings and at its 1036th meeting. The detailed exchange of views that took place at those meetings revealed a great identity of ideas in the Commission as to the most appropriate way to set about codifying the topic of state responsibility and as to the criteria that should govern the preparation of the different parts of the draft articles which the Commission now proposes to draw up on the subject. The Special Rapporteur, in summing up the debate, gave an account of the views of members of the Commission and announced his future plan of work. There was general agreement on the main lines of the programme to be undertaken on the subject during the next sessions.

80. Thus the Commission was in general agreement in recognizing that the codification of the topic of the international responsibility of states should not start with a definition of the contents of those rules of international law which laid obligations upon states in one or other sector of inter-state relations. The starting point should be the imputability to a state of the violation of one of the obligations arising from those rules, irrespective of their origin, nature and object. The aim, then, will be to establish, in an initial part of the proposed draft articles, the conditions under which an act which is internationally illicit and which, as such, generates an international responsibility can be imputed to a state. This first stage of the study will include the definition of the objective and subjective conditions for such imputation; the determination of the different possible characteristics of the act or omission imputed, and of its possible consequences; and an indication of the circumstances which, in exceptional cases, may prevent the imputation. The Special Rapporteur was asked to submit a report on the topic, containing a first set of draft articles, at the Commission's twenty-second session.

81. Once this first essential task has been accomplished, the Commission proposes to proceed to the second stage, which concerns determination of the consequences of imputing to a state an internationally illicit act and, consequently, the definition of the various forms and degrees of responsibility. To that end, the Commission was in general agreement in recognizing that two factors in particular would guide it in arriving at the required definition: namely, the greater or lesser importance to the international community of the rules giving rise to the obligations violated, and the greater or lesser seriousness of the violation itself. A definition of the degrees of international responsibility will include determination of the respective roles of reparation and sanction and, particularly in connexion with the latter, separate consideration of the cases in which responsibility is reflected only in the

establishment of a legal relationship between the defaulting state and the injured state and the cases in which, on the contrary, a particularly serious offence might also give rise to the establishment of a legal relationship between the guilty state and a group of states, or eventually between that state and the entire international community.

82. At a third stage it will be possible to take up certain problems concerning what has been termed the "implementation" of responsibility, and questions concerning the settlement of disputes which might be caused by a specific violation of the rules relating to international responsibility.

83. The Commission also agreed in recognizing the importance, alongside that of responsibility for internationally illicit acts, of the so-called responsibility for risk arising out of the performance of certain lawful activities, such as spatial and nuclear activities. However, questions in this latter category will not be dealt with simultaneously with those in the former category, mainly in order to avoid any confusion between two such sharply different hypotheses, which might have an adverse effect on the understanding of the main subject. Any examination of such questions will therefore be deferred until a later stage in the Commission's work. The same will apply to the study of questions relating to the responsibility of subjects of international law other than states.

84. The Commission was also in agreement in recognizing that the strict criteria by which it proposes to be guided in codifying the topic of the international responsibility of states do not necessarily entail renouncing the idea of proceeding, under a separate heading, with the codification of certain separate subjects of international law with which that of responsibility has often been linked.

[page 31]

## CHAPTER V

### THE MOST-FAVoured-NATION CLAUSE

85. At its sixteenth session, in 1964, the Commission considered a proposal put forward by one of its members, Mr. Jiménez de Aréchaga, to the effect that it should include in its draft on the law of treaties a provision on the so-called "most-favoured-nation clause." The suggested provision was intended to reserve formally the clause from the operation of the articles dealing with the problem of the effect of treaties on third states.<sup>87</sup> In support of the proposal it was urged that the broad and general terms in which the articles relating to third states had been provisionally adopted by the Commission might blur the distinction between provisions in favour of third states and the operation of the most-favoured-nation clause, a matter that might be of particular importance in connexion with the article dealing with the revocation or amendment of provisions regarding obligations or rights of states not parties to treaties. The Commission, however, while recognizing the importance of not prejudicing in any way the operation of most-favoured-nation clauses, did not consider that these clauses were in any

<sup>87</sup> Yearbook of the International Law Commission, 1964, Vol. I, 752nd meeting, par. 2.

way touched by the articles in question and for that reason decided that there was no need to include a saving clause of the kind proposed. In regard to most-favoured-nation clauses in general, the Commission did not think it advisable to deal with them in the codification of the general law of treaties, although it felt that they might at some future time appropriately form the subject of a special study.<sup>88</sup> The Commission maintained this position in the course of its eighteenth session.<sup>89</sup>

86. At its nineteenth session, in 1967, the Commission noted that several representatives in the Sixth Committee at the twenty-first session of the General Assembly had urged that it should deal with the most-favoured-nation clause as an aspect of the general law of treaties. In view of the interest expressed in the matter and of the fact that clarification of its legal aspects might be of assistance to the United Nations Commission on International Trade Law (UNCITRAL) the Commission decided to place on its programme the topic of most-favoured-nation clauses in the law of treaties and appointed Mr. Endre Ustor as Special Rapporteur thereon.<sup>90</sup>

87. At its twentieth session, in 1968, the Special Rapporteur submitted a working paper<sup>91</sup> giving an account of the preparatory work undertaken by him on the topic and outlining the possible contents of a report to be presented at a later stage. The Special Rapporteur also submitted a questionnaire listing points on which he specifically asked the members of the Commission to express their opinion. The Commission, while recognizing the fundamental importance of the role of the most-favoured-nation clause in the domain of international trade, instructed the Special Rapporteur not to confine his studies to that area but to explore the major fields of application of the clause. The Commission considered that it should focus on the legal character of the clause and the legal conditions governing its application and that it should clarify the scope and effect of the clause as a legal institution in the context of all aspects of its practical application. The Commission wished to base its studies on the broadest possible foundations without, however, entering into fields outside its functions. In the light of these considerations, the Commission instructed the Special Rapporteur to consult, through the Secretariat, all organizations and interested agencies which may have particular experience in the application of the most-favoured-nation clause.

<sup>88</sup> Official Records of the General Assembly, Nineteenth Session, Supplement No. 9 (A/5809), par. 21; Yearbook of the International Law Commission, 1964, Vol. II, p. 176.

<sup>89</sup> Official Records of the General Assembly, Twenty-first Session, Supplement No. 9 (A/6309/Rev.1), part II, par. 32; Yearbook of the International Law Commission, 1966, Vol. II, p. 177.

<sup>90</sup> Official Records of the General Assembly, Twenty-second Session, Supplement No. 9 (A/6709/Rev.1 and Rev.1/Corr.1), par. 48; Yearbook of the International Law Commission, 1967, Vol. II, p. 369.

<sup>91</sup> Yearbook of the International Law Commission, 1968, Vol. II, document A/CN.4/L.127.

88. By Resolution 2400 (XXIII) of 11 December 1968, the General Assembly recommended that the Commission, *inter alia*, continue its study of the most-favoured-nation clause.

89. At the present session of the Commission, the Special Rapporteur submitted his first report (A/CN.4/213), containing a history of the most-favoured-nation clause up to the time of the Second World War, with particular emphasis on the work on the clause undertaken in the League of Nations or under its aegis. The Commission considered the report at its 1036th meeting and accepting the suggestion of the Special Rapporteur instructed him to prepare next a study based mainly on the replies from organizations and interested agencies consulted by the Secretary-General and having regard also to three cases dealt with by the International Court of Justice relevant to the clause.<sup>92</sup>

[page 32]

#### CHAPTER VI

#### OTHER DECISIONS AND CONCLUSIONS OF THE COMMISSION

##### A. Review of the Commission's programme and methods of work

90. The Commission referred to its initiative, as indicated in paragraph 98 (a) of its report on the work of its twentieth session,<sup>93</sup> in proposing that the term of office of its members should be extended in order better to ensure the necessary continuity in its membership, having regard to the method of work provided for in its Statute and the nature of the codification process itself, especially when it was engaged in the preparation of legal texts for the codification of particularly large and important sectors of international law. With a view to removing all doubt concerning this intention, the Commission wishes to make it clear that, in its opinion and in the light of its experience, the term of office of its members should preferably be seven years and that, in making a proposal for such an extension, it had solely intended to refer to the future terms of office of Commission members.

91. The Commission confirmed its intention of bringing up to date in 1970 or 1971 its long-term programme of work, taking into account the General Assembly recommendations and the international community's current needs, and discarding those topics on the 1949 list which were no longer suitable for treatment. For this purpose the Commission will again survey the topics suitable for codification in the whole field of international law, in accordance with Article 18 of its Statute. It asked the Secretary-General to submit a preparatory working paper with a view to facilitating this task.

<sup>92</sup> *Anglo-Iranian Oil Company Case (Jurisdiction)*, ICJ Reports, 1952, p. 93; *Case concerning rights of nationals of United States of America in Morocco*, ICJ Reports, 1952, p. 176; *Ambatielos Case (Merits: obligation to arbitrate)*, ICJ Reports, 1953, p. 10.

<sup>93</sup> *Official Records of the General Assembly, Twenty-third Session, Supplement No. 9 (A/7203/Rev.1)*; *Yearbook of the International Law Commission*, 1968, Vol. II.



## B. Organization of future work

92. The Commission reaffirms its view that it is desirable to complete the study of relations between states and international organizations before the expiry of the term of office of its present membership. As already stated in paragraph 104 of the report on the work of its twentieth session, the Commission aims, *inter alia*, at concluding its work on that topic at its twenty-third session, in 1971, if the scope of the work on the subject should allow it. In view of the stage which the work on the topic has now reached and taking into account the time-lapse for the receipt of comments from governments, the Commission considers that its needs would not best be met by requesting authorization from the General Assembly to hold a winter session in 1970, a possibility that had been reserved in the Commission's report on the work of its twentieth session.<sup>94</sup> However, it deems it necessary to reserve the possibility of holding an additional or extended session in 1971 in order to achieve its stated aim. The Commission agreed to record this decision in the present report so that arrangements for budgetary appropriations could be made in time.

93. The Commission intends, as a matter of priority, at its twenty-second session in 1970, to conclude the first reading of its draft on relations between states and international organizations and to undertake substantive consideration of state responsibility and succession in respect of treaties. Also at that session, the Commission plans to further its study of succession of states in economic and financial matters. During its mandate, the Commission will continue its study of the most-favoured-nation clause.

## C. Relations with the International Court of Justice

94. The Commission devoted its 1004th meeting to the visit of the President of the International Court of Justice, Mr. José Luis Bustamante y Rivero, who commented on the features characterizing the functions of the Court and the Commission for the furtherance of international law, in accordance with their respective statutes.

## D. Co-operation with other bodies

### 1. ASIAN-AFRICAN LEGAL CONSULTATIVE COMMITTEE

95. At the 1010th meeting, Mr. Abdul Hakim Tabibi introduced his report (A/CN.4/212) on the tenth session of the Asian-African Legal Consultative Committee, held at Karachi from 21 to 30 January 1969, which he had attended as an observer for the Commission.

96. The Asian-African Legal Consultative Committee was represented before the Commission by Mr. Sharifuddin Pirzada, President of the tenth session of that Committee, who addressed the Commission at the 1021st meeting. He commented on the origins and tasks of the Committee, which had, at its various sessions, discussed and formulated principles on such topics as the privileges and immunities of diplomatic envoys, the extradition of offenders, free legal aid, reciprocal enforcement of foreign judg-

<sup>94</sup> *Ibid.*, par. 103.

ments, arbitral procedure and the legality of nuclear tests. He indicated that at its Karachi session, the Committee had devoted considerable time to the Commission's draft articles on the law of treaties in an attempt to reach agreement on certain important articles in the interests of Asian-African solidarity. The Committee had also considered the law of international rivers, with particular attention to the needs of the Asian-African countries, as well as the subject of the rights of refugees, on which a resolution had been unanimously adopted. In this respect, he recalled that at its [page 33] eighth session in Bangkok, the Committee had adopted a report on the rights of refugees and had agreed to reconsider at its following session the Bangkok principles concerning the treatment of refugees. He stated that the Committee was taking a particular interest in such items on the Commission's present agenda as relations between states and international organizations, succession of states and governments, and state responsibility.

97. The Commission was informed that the next session of the Committee, to which it has a standing invitation to send an observer, would be held in Ghana. The Commission requested its Chairman, Mr. Nikolai Ushakov, to attend the Committee's session or, if he was unable to do so, to appoint another member of the Commission for the purpose.

## 2. EUROPEAN COMMITTEE ON LEGAL CO-OPERATION

98. The European Committee on Legal Co-operation was represented by Mr. H. Golsong, who addressed the Commission at the 1029th meeting.

99. He mentioned that since the Commission's twentieth session, a European international agreement concerning the immunity of persons summoned to appear before the European Commission or Court of Human Rights had been opened to signature and had been signed by several states. Also, two further documents had been virtually completed: a convention on state immunity from jurisdiction, and a report on the privileges and immunities of international organizations. He further referred to the resolution approved by the Committee of Ministers, adopting and publishing a guide to an index of digests of national state practice in the field of public international law. He indicated that the Committee's current work included a draft on third party risk insurance for motorists, a draft on harmonization of processes for computerizing legal data in the western European countries, in particular, the terminology of international treaties, and a draft convention on the international validity of judicial decisions in penal matters. He also called attention to the Committee's decision, taken at its session in June 1969, to hold exchanges of views between its member states on the International Law Commission's draft more frequently than had taken place at times in the past.

100. The Commission was informed that the next session of the Committee, to which it has a standing invitation to send an observer, would be held at Strasbourg in December 1969. The Commission requested its Chairman, Mr. Nikolai Ushakov, to attend the session or, if he were unable to do so, to appoint another member of the Commission for the purpose.

### 3. INTER-AMERICAN JURIDICAL COMMITTEE

101. At the 1010th meeting, Mr. José María Ruda introduced his report (A/CN.4/215) on the 1968 meeting of the Inter-American Juridical Committee, held at Rio de Janeiro, from mid-June to early September 1968, which he had attended from 26 to 30 August as an observer for the Commission.

102. The Inter-American Juridical Committee was represented by Mr. José Joaquín Caicedo Castilla, who addressed the Commission at its 999th meeting. He drew attention to the resolution adopted by the Committee on the occasion of the attendance at some of its meetings of the Commission's Chairman. He referred to the items of substance dealt with by the Committee in 1968, namely: harmonization of the legislation of the Latin-American countries on companies, including the problem of international companies; an Inter-American Convention on Reciprocal Recognition of Companies and Juridical Persons; a uniform law for Latin America on commercial documents, and the rules of private international law applicable to the above matters. He further referred to the preparation of the preliminary draft of the Committee's Statutes and indicated that during the present year, the Committee would study the problems of improving the inter-American system for the peaceful settlement of disputes and of the juridical status of the so-called "foreign guerillas." He stated that the Committee was also concerned with the question of state responsibility. In a report approved in 1961, entitled "Contribution of the American continent to the principles of international law that govern the responsibility of the state," the Committee had laid down ten principles which expressed Latin American law on the subject. He expressed the hope that, in discussing the topic of state responsibility, the Commission would take the Latin American position into account as a new element which had introduced a change in the previously accepted rules of international law.

103. The Commission was informed that the 1969 session of the Committee, to which it has a standing invitation to send an observer, would be held at Rio de Janeiro. The Commission requested its Chairman, Mr. Nikolai Ushakov, to attend the Committee's session or, if he was unable to do so, to appoint another member of the Commission for the purpose.

#### E. Date and place of the twenty-second session

104. The Commission decided to hold its next session at the United Nations Office at Geneva for ten weeks from 4 May to 10 July 1970.

#### F. Representation at the twenty-fourth session of the General Assembly

105. The Commission decided that it would be represented at the twenty-fourth session of the General Assembly by its Chairman, Mr. Nikolai Ushakov.

#### G. Seminar on International Law

106. In pursuance of General Assembly Resolution 2400 (XXIII) of 11 December 1968, the United Nations Office at Geneva organized during the

twenty-first session of the Commission a fifth session of the Seminar on International Law for advanced students and young [page 34] government officials whose functions habitually included a consideration of questions of international law.

107. Between 16 June and 4 July 1969, the Seminar held thirteen meetings devoted to lectures followed by discussion. It was attended by twenty-two students, all from different countries; they also attended meetings of the Commission during that period and had access to the facilities provided by the Library in the Palais des Nations. They heard lectures by nine members of the Commission (Mr. Albónico, Mr. Bartoš, Mr. Castrén, Mr. Kearney, Mr. Rosenne, Mr. Tabibi, Mr. Ustor, Sir Humphrey Waldock and Mr. Yasseen), a former member of the Commission (Mr. Žourek), the Legal Adviser to the International Labour Office (Mr. Wolf) and one member of the Secretariat (Mr. Raton). The lectures were given on various subjects connected with the work of the Commission, such as the codification and development of international law in the United Nations and the problems raised by the Vienna Conventions on diplomatic law, consular law and the law of treaties. Other lectures dealt with the question of special missions, the international unification of private law and the activities of UNCITRAL, the principle of co-operation in international law and the problems of landlocked states. One lecture was devoted to the International Labour Organization.

108. The Seminar was held without cost to the United Nations, which assumed no responsibility for the travel or living expenses of the participants. However, the Governments of Denmark, Finland, the Federal Republic of Germany, Israel, the Netherlands, Norway and Sweden offered scholarships for participants from developing countries. Nine candidates were chosen to be beneficiaries of the scholarships, but two were unable to attend the session. Three students holding scholarships granted by the United Nations Institute for Training and Research were also admitted to the Seminar. The grant of scholarships is making it possible to achieve a much better geographical distribution of students and to bring deserving candidates from distant countries, who would otherwise be unable to attend the session solely for pecuniary reasons. It is therefore desirable that scholarships should again be granted for the next session.

109. The Commission expressed appreciation, in particular to Mr. Pierre Raton, for the manner in which the Seminar was organized, the high level of discussion and the results achieved. The Commission recommended that future seminars be held in conjunction with its sessions.

#### H. Index of the Commission's documents

110. The Commission was informed that the United Nations Library at Geneva is preparing an Index of the main documents of the Commission issued during its first twenty sessions. The Commission expresses its appreciation of the initiative taken by the Library at Geneva; it is convinced that the Index will be of value to the Commission and to jurists throughout the world.

## INTERNATIONAL LEGAL MATERIALS

The following documents are reproduced in Volume 9, No. 3 (May), 1970, of *International Legal Materials: Current Documents*:<sup>1</sup>

## VOLUME IX, NUMBER 3 (May, 1970)

	PAGE
TREATIES AND AGREEMENTS	
Council of Europe:	
Draft European Convention on the International Validity of Criminal Judgments .....	445
European Convention Concerning Information on Foreign Law ..	477
European Economic Community-African and Malagasy States: Convention of Association and Annexed Documents .....	484
Finland-Union of Soviet Socialist Republics: Agreement on Fishing and Sealing .....	507
United Nations: Revised Draft Protocol on Psychotropic Substances	511
United States-Union of Soviet Socialist Republics: Draft Treaty on Prohibiting the Emplacement of Nuclear Weapons on the Seabed and Ocean Floor .....	534
LEGISLATION AND REGULATIONS	
Canada:	
Bill to Prevent Pollution of Arctic Waters .....	543
Bill to Extend Territorial Sea and Fishing Zones .....	553
United States: State of Massachusetts Act to Define the Rights of Massachusetts Inhabitants Inducted or Serving in the U.S. Military Forces .....	555
JUDICIAL AND SIMILAR PROCEEDINGS	
East African Community:	
Kenya High Court Judgment on Conflict of the Kenya Constitution and the East African Community Act .....	556
Court of Appeal Judgment on Conflict of the Kenya Constitution and the East African Community Act .....	561

<sup>1</sup> The annual subscription for six numbers of *International Legal Materials* is \$25.00; there is a concessionary rate of \$15.00 for members of the American Society of International Law. Inquiries and orders should be directed to *International Legal Materials*, American Society of International Law, 2223 Massachusetts Avenue, N. W., Washington, D. C. 20008.

	PAGE
Switzerland: Federal Court Decision Concerning the Obligation of Banks to Furnish Information in Tax Fraud Proceedings .....	567

## REPORTS

United States: Report of the U.S. House Committee on Banking and Currency Concerning Bank Records and Foreign Transactions ...	583
---	-----

## OTHER DOCUMENTS

Canadian Legislation on Arctic Pollution and Territorial Sea and Fishing Zones:	
Canadian Declaration on the Compulsory Jurisdiction of the In- ternational Court of Justice .....	598
Canadian Prime Minister's Remarks on the Proposed Legislation .	600
United States Statement on Canada's Proposed Legislation .....	605
Canadian Reply to the U.S. Government .....	607
Statute of the International Court of Justice. Documents Concern- ing Amendment of Article 22 on the Seat of the Court .....	616
"Torrey Canyon" Agreement on Claims. Remarks by the U.K. Attor- ney General Concerning the Settlement .....	633
United Nations: Security Council Resolutions on Southern Rhodesia	636

# City Life

*Ten Subject Sets in the Irish University Press 1,000-Volume Series  
of the British Parliamentary Papers*

The beginning of the Industrial Revolution in England was also the beginning of present-day urban problems. And the investigations and studies of urban problems initiated by the British Parliament are our most important single resource on this period.

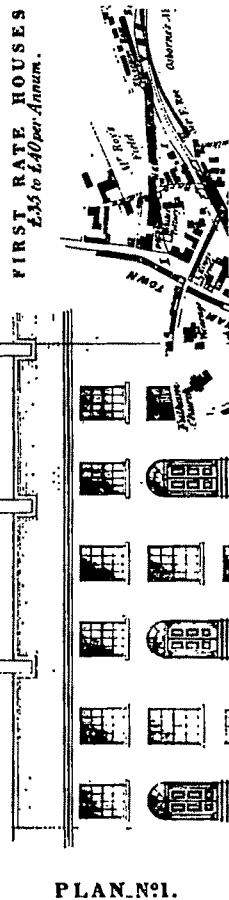
For the first time the vast resources of the British Parliamentary Papers (7,000 volumes published in the 19th century) have been organized by Irish University Press editors into 79 key subject sets, ten of which directly concern to the quality of city life.

Four subject sets relate to *Urban Areas*: HOUSING (3 volumes), PLANNING (10 volumes), SANITATION (7 volumes), WATER SUPPLY (9 volumes). Five sets relate to *Health*: GENERAL (17 volumes), FOOD AND DRUGS (5 volumes), MEDICAL PROFESSION (5 volumes), MENTAL (8 volumes), INFECTIOUS DISEASES (15 volumes). Plus a 30-volume subject set on POOR LAW.

The *Urban Areas* subject sets contain vital documentation on the growth of urban slums, dangers to public health, housing censuses of 250 towns, river pollution by industrial waste, and the administrative, scientific and engineering problems involved in dealing with the problems of city life.

Researchers for city-planning studies, social welfare professionals and students, medical and public health practitioners, all students and professionals concerned with the present-day quality of urban life will be greatly enriched by the vast wealth of information contained in these nine subject sets of the British Parliamentary Papers.

Free descriptive catalogs are available. Write today to receive your copies.



**Irish University Press, INC.**  
2 Holland Avenue, White Plains, N.Y.

Send, free, catalogs on ☐ Urban Areas, ☐ Health, ☐ Poor Law.  
☐ Send, free, additional information on the entire Irish University Press series of the British Parliamentary Papers.

Name \_\_\_\_\_

Address \_\_\_\_\_

Zip \_\_\_\_\_



*Robert Randle*

GENEVA 1954

**The Settlement of the Indochinese War**

" . . . by far the most detailed and comprehensive analysis of Geneva 1954 . . . unquestionably the standard reference work on the Accords." (John Norton Moore)  
Dr. Randle assesses the foreign relations of the powers as they jockeyed for position before the Conference, the day-to-day bargaining at Geneva, the defects of the Agreements, and their implementation in Cambodia, Laos, and Vietnam.

\$17.50

*Richard A. Falk*

**THE STATUS OF LAW IN  
INTERNATIONAL SOCIETY**

Following the pattern established in his book, *Legal Order in a Violent World*, Professor Falk brings the outlook, methods, and concerns of the social scientist to the study of international law. Among the topics he covers are the South West Africa decisions; the law-making capacity of the General Assembly; the assertion of unilateral claims to act in space; and the application of international law to domestic courts. *Published for the Center of International Studies, Princeton University*

\$15.00

*Richard A. Falk, Editor*

**THE VIETNAM WAR AND  
INTERNATIONAL LAW, Volume 2**

"A balanced exposition, by 34 contributors, of the principal legal problems arising over Vietnam. Immensely useful as a reference source for any legal point of view on the Vietnam involvement."—*Foreign Affairs*. *Sponsored by the American Society of International Law*

Cloth, \$25.00; Paperback, \$7.50

---

**Princeton University Press**

---

PRINCETON, NEW JERSEY 08540



Oxford University Press



## United Nations Peacekeeping, 1946-1967

DOCUMENTS AND COMMENTARY; VOLUME I: THE MIDDLE EAST; VOLUME II: ASIA; VOLUME III: EUROPE AND AFRICA

By ROSALYN HIGGINS, *Chatham House*. This three-volume series makes available for the first time a readily accessible and fully comprehensive collection of documents on each of the U. N. peacekeeping actions, the lesser as well as the better known. "Invaluable as a reference work. The research is exhaustive and just about every salient fact is included." —*Foreign Affairs*. (For the Royal Institute of International Affairs.) Volume I, \$17.75. Volume II, \$14.50. Volume III, Forthcoming

## Double Jeopardy

By MARTIN L. FRIEDLAND, *University of Toronto*. This examination of the history and current state of the rule against double jeopardy concentrates on British law but includes comparative material from other English-speaking jurisdictions, especially Canada and the United States. Analyzed are such topics as the rationale of the rule, its history, the termination of legal proceedings, dismissals on a procedural matter, accidental acquittals, technical acquittals, estoppels, perjury, and special pleas. \$14.50

## English and American Judges as Lawmakers

By LOUIS L. JAFFE, *Harvard University*. This book deals with the lawmaking functions of judges in a democracy. It contrasts English and American judges, explores the bold innovations of the American courts and propounds justification for that activity related to democratic theory while pointing out its dangers. The author criticizes the English judges for their restrictive notions of the judicial functions and their rejection of the great examples set by Coke, Mansfield, and the nineteenth-century judges. \$4.00

## The Concept of a Legal System

AN INTRODUCTION TO THE THEORY OF LEGAL SYSTEM

By JOSEPH RAZ, *Hebrew University, Jerusalem*. Three problems are explored in this study: What does it mean to assert or deny the existence of a legal system? How can one determine whether a given law belongs to a certain legal system? Is there a structure common to all legal systems, or the certain types of legal systems? The examination of these problems leads to a new approach to some traditional jurisprudential questions, though the conclusions reached are based on a critical appraisal of several previous theories. 7 text figures. \$7.25

OXFORD UNIVERSITY PRESS

200 Madison Avenue, New York, N.Y. 10016

# Human Rights and International Action

## THE CASE OF FREEDOM OF ASSOCIATION

Ernst B. Haas

This book argues that despite debates, resolutions, and treaties, the effort to protect human rights by international means has failed, that national ideologies and value systems, instead of coalescing, are growing more diffuse. Still, the record may be subject to improvement if the more modest and indirect functional approach is employed to protect certain limited but salient rights. To test this hypothesis, the author investigates some 500 complaints mediated by the ILO between 1950 and 1968. \$6.50

Order from your bookstore, please

**STANFORD UNIVERSITY PRESS**

## RECENT PUBLICATIONS OF THE EUROPEAN COURT OF HUMAN RIGHTS

(Bilingual editions in English and French)

### Series A: Judgments and Decisions

Case relating to certain aspects of the laws on the use of languages in education in Belgium (1 decision; 2 judgments): 1966-1968;  
Wemhoff Case: 1968;  
Neumeister Case: 1968;  
Stögmüller Case: 1969;  
Matznetter Case: 1969;  
Delcourt Case: 1970.

Price per volume: \$3.50

Available (and also earlier publications) at:

Manhattan Publishing Co.,  
225 Lafayette Street,  
NEW YORK, N. Y. 10012,  
U. S. A.

### Series B: Pleadings, Oral Arguments, Documents

This series contains in bound volumes the memorials, verbatim reports of hearings and other documents relating to the cases listed under Series A.

Price per volume: \$17.50

Publications Division,  
Council of Europe,  
67 STRASBOURG,  
France.

## **UN Protection of Civil and Political Rights**

*John Carey*

"Carey examines the past, present and possible future role of the UN in the protection of civil and political rights in the broadest sense. He discusses the work of the principal organs of the UN, the specialized agencies, various committees and commissions, both permanent and ad hoc. This institutional effort involves education, coercion (armed and economic), adjudication, negotiation, investigation, publicity and aid and comfort for the oppressed. The source of Carey's material was the multitude of UN documents setting out the resolutions, reports and comments of these UN bodies. His copious and excellent footnotes refer to the materials for those who wish more detailed information. Much of this source material is unavailable in standard library collections. Little of the material is even known to exist by most people.

"Carey's book must be the starting point for knowledge of the UN's work in the field of protection of civil and political rights."—J. W. Samuels, for *Canadian Bar Review*.

Vol. 8, Procedural Aspects of International Law Series

\$7.50

## **Law-Making in the International Civil Aviation Organization**

*Thomas Buergenthal*

"An analysis of the law-making function of I.C.A.O. as it deals with membership, technical legislation, dispute settlement, and amendment of the I.C.A.O. Convention. The author notes the collaborative climate of the proceedings, the avoidance of adjudication in favor of diplomacy, and the capacity of the organization for introducing change without formal amendment. He stresses the similarity of this gradual reinterpretation of the I.C.A.O. Convention to national constitutional change."—*Harvard International Law Journal*

"For both the aviation-law specialist and the student of international organizations."—*Stanford Law Review*

"A solid and scholarly monograph."—*Foreign Affairs*

Vol. 7, Procedural Aspects of International Law Series

\$10.50

*From your bookseller or*

**Syracuse University Press**

Syracuse, New York 13210

# United Nations Law Reports

Edited by John Carey

These four-page reports are monthly reviews of significant developments in the field of international law at the United Nations. Published twelve months of the year—September through August—they are designed to provide those concerned with international law with complete and up-to-date information in time-saving, summary form. A free sample copy may be obtained by writing to Walker and Company.

*Annual Subscription: \$15.00*  
*Bound edition of Volume III*  
*(September 1968-August 1969)*

*plus Index available in limited edition \$15.00*

"Let me express to you my admiration for your initiative and the excellence of your performance in editing the United Nations Law Reports."

Egon Schwelb  
Former Deputy Director,  
Division of Human  
Rights, United Nations  
Secretariat



WALKER AND COMPANY

720 FIFTH AVENUE • NEW YORK, N. Y. 10019

Volume IV

No. 2

## JOURNAL OF WORLD TRADE LAW

March/April 1970

*Special Issue*

### DEVELOPMENT AID

This special issue on DEVELOPMENT AID contains a total of 21 contributions and runs to some 300 pages.

#### SELECTED CONTENTS

The Significance of Aid to Africa R. K. A. Gardiner  
External Aid to the ECAFE Region U Nyun  
Latin American External Debt D. Avramovic  
The United Nations Development Programme Paul Berthoud  
The Mechanism and Distribution of Food Aid John Shaw  
African Economic Co-operation Revisited A. F. Ewing  
Other Ways in which Rich Countries Affect Development Dudley Seers  
Some Problems of International Aid H. W. Singer

The price of single copies of this issue only is £4 (\$11).

Six issues per year

Single issue £2.10.0 (\$7).

Annual subscription £12.12.0 (\$36).

60, Cole Park Road, Twickenham, Middlesex, England

# REPRINT AMERICAN JOURNAL OF INTERNATIONAL LAW

*Now available*

## Vols. 1-10, New York 1907-1916.

(Including Supplements and Special Supplements)

Cloth bound set .....	\$485.00
Paper bound set .....	430.00
Per volume, paper bound including Supplements .....	40.00
Per volume, paper bound without Supplements .....	35.00

### Regular Supplements to Vols. 1-10

Per volume, paper bound .....	10.00
-------------------------------	-------

### Special Supplements to Vols. 9, 10

Per volume, paper bound .....	20.00
-------------------------------	-------

## Analytical Index to Vols. 1-14, 1907-1920.

Paper bound .....	10.00
-------------------	-------

## Vols. 11-20, 1917-1926.

(Including Supplements and Special Supplements)

Cloth bound set .....	510.00
Paper bound set .....	460.00
Per volume, paper bound, including Supplements .....	45.00
Per volume, paper bound, without Supplements .....	35.00

### Regular Supplements to Vols. 11-20

Per volume, paper bound .....	10.00
-------------------------------	-------

### Special Supplements to Vols. 11, 20

Per volume, paper bound .....	20.00
-------------------------------	-------

## Vols. 34-44, 1940-1950, and Supplements 34-44.

Cloth bound set .....	560.00
Paper bound set .....	485.00
Per volume, paper bound .....	35.00

### Supplements to Vols. 34-44

Per volume, paper bound .....	10.00
-------------------------------	-------

## Vols. 45-54, 1951-1960, and Supplements 45-49, 1951-1955.

Cloth bound set .....	445.00
Paper bound set .....	400.00
Per volume, paper bound .....	35.00

### Supplements to Vols. 45-49

Per volume, paper bound .....	10.00
-------------------------------	-------

**ANALYTICAL INDEX TO AMERICAN JOURNAL OF INTERNATIONAL LAW AND SUPPLEMENTS, VOLS. 15 TO 34 (1921-1940), and PROCEEDINGS of the AMERICAN SOCIETY OF INTERNATIONAL LAW, 1921-1940. Paper bound \$20.00; Cloth bound \$22.50**

*Address all orders and inquiries to:*

## JOHNSON REPRINT CORPORATION

111 Fifth Avenue  
New York, N. Y. 10003

Berkeley Square House  
London, W.1, England

**BACK NUMBERS**  
*of the*  
**AMERICAN JOURNAL OF  
INTERNATIONAL LAW**  
*and*  
**PROCEEDINGS OF THE AMERICAN  
SOCIETY OF INTERNATIONAL LAW**

**T**HE Society has in stock a limited supply of back numbers of the **Journal** in the original paper bindings for sale at \$5.00 an issue, as follows:

Complete volumes of the **Journal**, that is, four quarterly issues, are available for the years 1964, 1966, 1968 and 1969. Numbers available for other years are: 1919: *January, April, July*; 1931, 1967: *January, April, October*; 1927, 1930, 1951, 1963, 1965: *April, July, October*; 1925, 1943: *April, July*; 1921, 1928, 1936, 1938, 1949, 1959, 1960, 1961: *July, October*; 1922, 1953: *January*; 1926, 1934, 1952, 1957: *July*; 1918, 1929, 1937, 1947, 1955, 1962: *October*.

**Supplement, 1935, Part I:** Harvard Research Draft Convention and Comment on Extradition.

**Special Supplements** (paper or cloth): 1917, 1926, 1928.

Single issues of the current volume (1970) may be obtained at \$4.50 a copy.

**Proceedings** are available for the years 1956-1958, 1961-1963, 1965-1969 at \$5.00 a volume.

Supply of some of the above issues is limited, and their availability is subject to prior sale.

Orders should be sent to the  
**American Journal of International Law**  
2223 Massachusetts Avenue, N. W., Washington, D. C. 20008

***Join—***

## **THE AMERICAN SOCIETY OF INTERNATIONAL LAW**

*As a member of the Society, you will receive*

- five issues each year of the most distinguished journal in the field, *THE AMERICAN JOURNAL OF INTERNATIONAL LAW*, including a special number reporting the *Proceedings* of the Society's Annual Meeting.
- the opportunity to buy other Society publications at reduced prices, such as the valuable bimonthly documentary, *INTERNATIONAL LEGAL MATERIALS*, and books published under Society auspices such as *THE VIETNAM WAR AND INTERNATIONAL LAW*.
- the Society's *LETTER TO MEMBERS*, which keeps you abreast of developments in the field.
- the opportunity to participate in significant, Society-sponsored meetings (the Annual Meeting, regional meetings, study panels).
- occasion to join with others in contributing to the development of international law through the Society's wide-ranging studies and publications.

If you wish to join the Society, please clip out this page, fill out the application on the reverse side, and mail it, together with your check, to the Membership Secretary, American Society of International Law, 2223 Massachusetts Avenue, N.W., Washington, D.C. 20008. You will receive the *Journal* and *Letter to Members* for the current year.

Members of whatever profession and nationality are welcome.

If you or your institution prefers to subscribe to the *Journal*, without joining the Society, please so indicate on the reverse side.

**Membership Secretary**  
**American Society of International Law**  
**2223 Massachusetts Avenue, N.W.**  
**Washington, D.C. 20008**

Please enroll me as a member of the American Society of International Law. My check, money order, UNESCO coupon, or payment in a convertible currency, is enclosed. I have checked the category of membership for which I am eligible:

- ☐ PROFESSIONAL MEMBERS (U.S. residents practicing law other than in government who have been members of the Bar for more than 10 years) ..... \$ 30
- ☐ RESIDENT REGULAR MEMBERS—residing in the United States ..... \$ 15
- ☐ NON-RESIDENT MEMBERS—not residing in the United States ..... \$ 10
- ☐ INTERMEDIATE MEMBERS (first 5 years of membership for those under 30 years of age at time of application) .... \$ 10
- ☐ CONTRIBUTING MEMBERS ..... \$ 50
- ☐ SUPPORTING MEMBERS ..... \$100
- ☐ ANNUAL PATRON ..... \$250
- ☐ LIFE ..... \$500

(Please Print)

Name .....

Mailing Address ..... Zip .....

Professional Affiliation: .....

Nationality .....

Particular professional interests: .....

Signature .....

PLEASE MAKE CHECKS PAYABLE TO *The American Society of International Law*. Contributions above obligatory dues, and all dues if membership is related to your work or profession, are tax deductible in the United States.

Please enter my subscription for the Journal at \$20 a year ..... ☐



*Recently published*

## **ANALYTICAL INDEX**

*to the*

## **AMERICAN JOURNAL OF INTERNATIONAL LAW AND SUPPLEMENTS**

**Volumes 35–54  
(1941–1960)**

*and the*

## **PROCEEDINGS OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW 1941–1960**

**545 pages**

**\$20.00**

**Cloth binding**

The Index is an indispensable research tool for all those who have a collection of the *American Journal of International Law*, its Supplements, and the Society's *Proceedings* for some or all of the years 1941 to 1960 inclusive. Ready access to and full use of the valuable material contained in those volumes can be had only through the Index. You are invited to send your order now to the American Society of International Law, 2223 Massachusetts Avenue, N.W., Washington, D. C. 20008.

*subscribe to*

# INTERNATIONAL LEGAL MATERIALS

*the indispensable documentary of international  
law and affairs*

Published six times a year, ILM contains 200 pages per issue of the vital raw material of international law: treaties, legislation, official reports, judicial and arbitral decisions, concession contracts. ILM is world wide in its source material; current and comprehensive in content.

Among the documents reproduced in recent issues of *International Legal Materials*, the following are of particular interest: the IMCO conventions on oil pollution, the UN Convention on Special Missions, the ICJ Judgment on the Barcelona Traction Case, items on the withdrawal of Greece from the Council of Europe, statements on US policy on the Law of the Sea, documents concerning the Canadian legislation on Arctic pollution, the most recent Yaoundé Convention between the EEC and associated African States, and important draft proposals in the arms control and disarmament field.

Subscription rates are \$25 a year (\$15 for ASIL members). Back volumes are \$30 per volume; single issues are \$5.

*Inquiries and orders should be addressed to:*

International Legal Materials  
American Society of International Law  
2223 Massachusetts Avenue, N.W.  
Washington, D.C. 20008

1 NOV 1970

# *American Journal of International Law*

**Vol. 64**

**September, 1970**

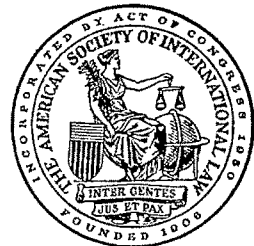
**No. 4**

**PROCEEDINGS  
of the  
AMERICAN SOCIETY OF  
INTERNATIONAL LAW**

**at its**

**SIXTY-FOURTH ANNUAL MEETING  
NEW YORK, N. Y.**

**APRIL 24-26, 1970**



***Published by the***

***American Society of International Law***

## PATRONS OF THE SOCIETY

Honorable ARTHUR H. DEAN  
Honorable HERMAN PHLEGER  
MRS. BENJAMIN J. TILLAR (deceased)  
MR. W. ROBERT MORGAN

## *In Memoriam*

DR. JAMES BROWN SCOTT  
MR. HENRY C. MORRIS  
MR. ARTHUR K. KUHN  
MR. ALEXANDER FREEMAN

## HONORARY MEMBERS

ROBERTO AGO, Rome, Italy  
Honorable RICARDO J. ALFARO, Panama, Republic of Panama  
Honorable CHARLES DE VISSCHER, Brussels, Belgium  
PAUL GUGGENHEIM, Geneva, Switzerland  
Honorable WALTER HALLSTEIN, Bonn, Germany  
Honorable EDUARDO JIMÉNEZ DE ARÉCHAGA, Montevideo, Uruguay  
HANS KELSEN, Berkeley, California  
SIR LOUIS NWACHUKWU MBANEFO, Enugu, Nigeria  
LORD MCNAIR OF GLENIFFER, Cambridge, England  
JULIUS STONE, Sydney, Australia  
Honorable KOTARO TANAKA, The Hague, The Netherlands  
E. N. VAN KLEFFENS, Almocageme, Portugal  
ALFRED VERDROSS-DROSSBERG, Vienna, Austria  
Honorable SIR MUHAMMAD ZAFRULLA KHAN, The Hague, The Netherlands

## PATRONAGE, GIFTS AND BEQUESTS

Upon donation to the Society of \$5,000 or more by gift or bequest, any member of the Society or individual eligible for membership may be elected a Patron of the Society. Upon donation of at least \$5,000 in the name of a deceased person, such person may be elected a Patron posthumously.

Gifts and bequests may be made in the name of the American Society of International Law, Washington, D. C. Such contributions are deductible from Federal returns for income, estate and gift tax purposes. The Society is incorporated by Act of Congress approved September 20, 1950 (64 Stat. 869).

## MANLEY O. HUDSON MEDAL

The American Society of International Law bestows from time to time without regard to nationality a gold medal to commemorate the life work of Manley O. Hudson. Such awards are made for pre-eminent scholarship and achievement in international law and in the promotion of the establishment and maintenance of international relations on the basis of law and justice. Medals have been awarded to Manley O. Hudson (1956), Lord McNair (1959), Philip C. Jessup (1964), Charles De Visscher (1966), and Paul Guggenheim (1970).

**AMERICAN JOURNAL  
OF  
INTERNATIONAL LAW**



**Vol. 64**

**September, 1970**

**No. 4**

**PROCEEDINGS  
of the  
AMERICAN SOCIETY OF  
INTERNATIONAL LAW  
at its  
SIXTY-FOURTH ANNUAL MEETING  
Held at  
NEW YORK, N. Y.  
April 24-26, 1970**

It is the policy of the American Society of International Law not to take an official position by resolution or otherwise upon controversial questions. The views expressed in the addresses and remarks delivered at its annual meetings and appearing in its JOURNAL are those of the individual speakers and are not to be taken as representing the views of the Society.

The JOURNAL is published 5 times a year, issue No. 4 (September) carrying the Proceedings of the Annual Meeting of The American Society of International Law. The JOURNAL is supplied to all members of the Society without extra charge. The annual subscription to non-members is \$20.00. Available back numbers of the current volume of the JOURNAL will be supplied at \$4.50 a copy; other available back numbers at \$5.00 a copy.

Subscriptions, orders for back numbers, correspondence with reference to the JOURNAL, manuscripts and books for review should be sent to the Assistant Editor of the JOURNAL, 2223 Massachusetts Avenue, N. W., Washington, D. C. 20008.

PUBLICATION OFFICE:  
PRINCE AND LEMON STREETS  
LANCASTER, PA. 17604

EDITORIAL AND EXECUTIVE OFFICE:  
2223 MASSACHUSETTS AVENUE, N. W.  
WASHINGTON, D. C. 20008

Copyright © 1970 by The American Society of International Law  
Second-class postage paid at Lancaster, Pa.

AMERICAN JOURNAL  
OF  
INTERNATIONAL LAW

Vol. 64

September, 1970

No. 4

PROCEEDINGS OF THE SIXTY-FOURTH ANNUAL MEETING OF THE  
AMERICAN SOCIETY OF INTERNATIONAL LAW  
NEW YORK, APRIL 24-26, 1970

CONTENTS

PAGE

THE UNITED NATIONS: APPRAISAL AT 25 YEARS

FIRST SESSION

Friday, April 24, 1970, at 2:15 p.m.

Panel: The United Nations and Peacekeeping

Chairman: *Elmore Jackson*

Address, "Lessons of United Nations Peacekeeping in Cyprus," by <i>David H. Popper</i> .....	1
Address, "Some Perspectives on Peacekeeping Institutions," by <i>Law- rence L. Fabian</i> .....	9
Comments by Major General <i>Indarjit Rikāye</i> .....	16
Discussion .....	18

Reporter: *Brenda Brimmer Mahoney*

Panel: The United Nations and Lawmaking

Chairman: *Wolfgang Friedmann*

Address, "The Rôle of the International Law Commission," by <i>Shabtai Rosenne</i> .....	24
Address, "The United Nations and Lawmaking: The Political Organs," by <i>Rosalyn Higgins</i> .....	37
Address, "The Impact of the U. N. Structure, Including that of the Specialized Agencies, on the Law of International Organization," by <i>D. W. Bowett</i> .....	48
Discussion .....	52

Reporter: *Michael Kaprelian*

SECOND SESSION

Friday, April 24, 1970, at 8:15 p.m.

Panel: The United Nations and Legal Aspects of the Search for Peace  
in the Middle East

Chairman: *Roger D. Fisher*

Address, "Legal Aspects of the Search for Peace in the Middle East," by <i>Eugene V. Rostow</i> .....	64
Address, "The Middle Eastern Crisis," by <i>Quincy Wright</i> .....	71
Comments:	
<i>Robert W. Tucker</i> .....	78
<i>John J. Barceló III</i> .....	79
Discussion .....	81

Reporter: *William E. Butler*

**Panel: The United Nations System and Financing Transnational Investment**

Chairman: <i>Covey T. Oliver</i>	
Address, "Blending Public and Private Capital," by <i>R. B. J. Richards</i>	87
Address, "The Rôle of Edge Act Corporations in Transnational Financing," by <i>Carroll R. Wetzel</i>	91
Address, "Restraints on Direct Investment," by <i>Franz M. Oppenheimer</i>	94
Comments: <i>Harry Fitzgibbon</i>	100
Discussion	101
Reporter: <i>Philip Huyck</i>	

**THIRD SESSION**

Saturday, April 25, 1970, at 9:30 a.m.

**Panel: The United Nations and Race: Will U. N. Law Affect Victims of Racial Discrimination and Oppressors?**

Chairman: <i>Frank C. Newman</i>	
Introduction: "United Nations Law and Racial Discrimination: An Introductory Outline," by <i>Frank C. Newman</i>	106
Address, "Will the Rapidly Accumulating Body of U. N. Law on Racial Discrimination Truly Be Effective?" by <i>Egerton R. Richardson</i>	110
Address, "United Nations Law on Racial Discrimination," by <i>Rita Hauser</i>	114
Address, "United Nations Law on Racial Discrimination," by <i>T. T. E. Koh</i>	119
Remarks by <i>William T. Coleman, Jr.</i>	121
Discussion	125
Reporter: <i>Thomas E. Pollock, III</i>	

**Panel: Extraterritorial Application of Law**

Chairman: <i>Willis L. M. Reese</i>	
Address, "Extraterritorial Application of Law—General Principles," by <i>Henry Harfield</i>	130
Address, "Limits Imposed by International Law on Regulation of Extraterritorial Commercial Activity," by <i>Isaac N. P. Stokes</i>	135
Address, "Extraterritorial Application of Law: United States Securities Laws," by <i>P. A. Bator</i>	141
Discussion	145
Reporter: <i>William W. Reese</i>	

**Panel: The United Nations and Science**

Chairman: <i>Harold D. Lasswell</i>	
Address, "The United Nations and the Social and Behavioral Sciences," by <i>Alexander Szalai</i>	148
Address, "International Technology Assessment and the United Nations System," by <i>Dennis Livingston</i>	163
Address, "The U. N. and Science: Past and Future Implications for World Health," by <i>Mary Ellen Caldwell</i>	172
Remarks by <i>Carroll L. Wilson</i>	183
Discussion	185
Reporter: <i>Cormac K. H. O'Malley</i>	



## FOURTH SESSION

Saturday, April 25, 1970, at 2:15 p.m.

## Panel: The United Nations and Disarmament

Chairman: *Adrian S. Fisher*

Address, "U. N. Involvement in Disarmament: The Case of the Non-Proliferation Treaty," by <i>Charles N. Van Doren</i> .....	191
Address, "The Banning of Poison Gas and Germ Warfare: The U. N. Rôle," by <i>George Bunn</i> .....	194
Address, "Prospects for SALT," by <i>Morton H. Halperin</i> .....	200
Remarks by <i>Leon Lipson</i> .....	203
Discussion .....	206

Reporter: *Anne P. Simons*

## Panel: The United Nations and the Environment

Chairman: *Richard N. Gardner*

Introduction: "Can the U. N. Lead the Environmental Parade?" by <i>Richard N. Gardner</i> .....	211
Remarks by <i>Christian Herter, Jr.</i> .....	214
Address, "Toward Equilibrium in the World Order System," by <i>Richard A. Falk</i> .....	217
Comments: <i>Robert E. Stein</i> .....	224
<i>Timothy B. Atkeson</i> .....	226
<i>Donald McRae</i> .....	227
Discussion .....	230

Reporter: *Philippe Schreiber*

## Panel: Practical Aspects of International Litigation

Chairman: *Ernest A. Gross*

Address, "What Litigators Should Know About the United Nations," by <i>John Carey</i> .....	238
Address, "Practical Aspects of International Litigation," by <i>Howard H. Bachrach</i> .....	245
Address, "Practical Aspects of International Litigation—Arbitration," by <i>Henry P. deVries</i> .....	251
Discussion .....	253

Reporter: *Thomas St. G. Bissell*

## FIFTH SESSION

Sunday, April 26, 1970, at 9:30 a.m.

## Business Meeting

Report of the Executive Director .....	260
Reports of Committees:	
Annual Awards .....	262
Selection of Honorary Members .....	262
Publications of the Department of State and the United Nations ..	263
Nominations .....	265
Ad hoc Committee on Governance .....	266

	PAGE
Resolutions:	
Publication of <i>Foreign Relations of the United States</i> .....	264
Documentation of the U. N. Committee on the Elimination of Racial Discrimination .....	265
Election of Officers .....	265

Sunday, April 26, 1970, at 10:30 a.m.

<b>Philip C. Jessup International Law Moot Court Competition: Case con- cerning Claims Arising Out of the Nationalization of the United Petroleum Company by the Government of Amazonia— United States of America v. Amazonia</b>	
Judges: The Honorable <i>Philip C. Jessup</i> , former Judge of the Interna- tional Court of Justice	
Dr. <i>F. V. García-Amador</i> , Director, Department of Legal Affairs, Organization of American States	
Professor <i>Clive Parry</i> , Cambridge University	
Finalists: University of Miami v. University of Kentucky .....	270

#### Annual Dinner

Saturday, April 25, 1970, at 7:30 p.m.

Remarks of Toastmaster .....	271, 273, 276, 284, 291
Presentation of Manley O. Hudson Medal to Professor Paul Guggen- heim .....	271
Remarks of Ambassador <i>Edvard Hambro</i> .....	272
Remarks of Ambassador <i>Bernard Turrettini</i> .....	273
Message from Professor <i>Guggenheim</i> .....	274
Message from the Secretary General of the United Nations .....	276
Address, "The Future of the United Nations," by <i>Oscar Schachter</i> , President of the Society .....	277
Remarks of the Honorable <i>Philip C. Jessup</i> .....	284
Address, "The Rule of Law and the Settlement of International Dis- putes," by the Honorable <i>William P. Rogers</i> , Secretary of State ....	285

#### Appendix

MEMBERS EMERITI .....	292
IN MEMORIAM .....	292
REPORT OF THE COMMITTEE ON PUBLICATIONS OF THE DEPARTMENT OF STATE AND THE UNITED NATIONS .....	293
REPORT OF THE PRESIDENT OF THE ASSOCIATION OF STUDENT INTERNA- TIONAL LAW SOCIETIES .....	315
OFFICERS AND COMMITTEES FOR THE YEAR 1970-1971 .....	320
BOARD OF REVIEW AND DEVELOPMENT .....	323
INCORPORATION ACT OF SEPTEMBER 20, 1950 .....	326
RESOLUTION OF APRIL 28, 1951 .....	329
CONSTITUTION OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW ...	330
REGULATIONS OF THE SOCIETY .....	334
INDEX .....	346

**SIXTY-FOURTH ANNUAL MEETING  
OF  
THE AMERICAN SOCIETY OF INTERNATIONAL LAW**

**THE WALDORF-ASTORIA HOTEL, NEW YORK, N. Y.**

**THE UNITED NATIONS: APPRAISAL AT 25 YEARS**

**FIRST SESSION**

**Friday, April 24, 1970, at 2:15 p.m.**

**The United Nations and Peacekeeping**

The session convened at 2:15 o'clock p.m. in the Basildon Room of the Waldorf-Astoria Hotel, Mr. ELMORE JACKSON presiding.

**LESSONS OF UNITED NATIONS PEACEKEEPING  
IN CYPRUS**

*By David H. Pooper\**

**I. INTRODUCTION**

For an island only half the size of New Jersey, inhabited by no more than 630,000 people, Cyprus has had the capacity in recent years to register a fairly high political decibel count. Every three or four years there has been a sharp crescendo. In 1959-60, the scenario led to the creation of a new, bi-national state designed to permit the 80 percent of the population who are Greeks in language and culture to live amicably with the 18 percent who are in a similar sense Turks. In 1963 and 1964 this constitutional structure collapsed, and the two communities fell apart after bloody fighting. In 1967 a threat to their uneasy coexistence produced another outburst. And political violence in March, 1970, though not a reflection of intercommunal strife, once again rang alarm bells in a number of Foreign Offices, including our own.

Thus, for over a decade, the equilibrium in Cyprus has been unstable. The protagonists—Greek and Turkish Cypriots—have recurrently been in sharp confrontation. Behind them, the Governments of Greece and Turkey have been alert to the condition of their ethnic brothers. For these governments there is no more neuralgic international problem. More broadly, conflict between them would necessarily impair NATO defenses in the Eastern Mediterranean region. At a time when Soviet power is increasingly manifested there—at a time when the Arab-Israeli conflict

\* Ambassador of the United States to Cyprus. The views expressed are those of the author in his personal capacity and are not to be construed as representing Government policy.

engages the Americans and the Russians—the possibility of trouble in Cyprus can conjure up some most unpleasant vistas.

Given this catalytic capacity, the Cyprus problem has properly been a concern of the international community. Greece, Turkey, and the United Kingdom have had a rôle as Guarantor Powers for Cyprus under the London and Zurich agreements of 1959. But with the Cyprus constitutional crisis in 1963, President Makarios insisted that peacekeeping proposals must envisage forces drawn from a range of states wider than the Guarantor Powers, and wider than NATO. Divergencies were reconciled in the U.N. Security Council, and the “United Nations Peacekeeping Force in Cyprus” (UNFICYP), sanctioned by the Council on March 4, 1964, quickly began functioning on the island. It has been there ever since, its mandate being regularly prolonged at three or six-month intervals.

## II. THE SHAPE OF UNFICYP

Though UNFICYP has shrunk from its original peak of 6,400 men to less than half that size today, its national composition has been little changed since its inception. The British have consistently furnished the largest single contingent. Normally, under United Nations practice, a permanent member of the Security Council would not be providing forces for a United Nations peacekeeping mission. In this case, it was reasonable that the United Kingdom as one of the Guarantors should continue to carry part of the peacekeeping load, the more so because the Sovereign Base Areas it retains in Cyprus have provided the bulk of the logistic support for the entire force.

Other UNFICYP contingents, essentially configured as battalion groups, have been provided by Canada and Denmark (NATO members) and by Ireland, Finland and Sweden (neutrals). Austria has furnished a field hospital, while Australia, Austria, Denmark and Sweden together provide a total of 175 civilian police. Rotation of contingents takes place every six months.

All contingents are national forces. Only the Headquarters is staffed on a multilateral basis. There is no uniformity in the composition of the military units. The British and Canadians send professional battalion units for service; the Irish recruit volunteers from the army, who frequently repeat their tours in Cyprus; the Nordic countries form *ad hoc* units from reservists recruited individually at home. These discrepancies do not appear to have produced any significant variations in military performance in the conditions of the Cyprus peacekeeping operation.

A more troublesome anomaly arises on the financial side. Since the Nordic contingents consist of recruits from civilian life, all their pay and allowances represent extra and extraordinary costs to the government, and all are charged to the United Nations. The Canadian and Irish contingents, on the other hand, are part of the regular armed forces. The British and Australians make no claims against UNFICYP for their costs. As a result, per man monthly costs to the United Nations vary from zero for the British and \$74 for the Canadians, to high figures of \$575 for the

Danish military contingent and \$518 for the Swedes. The total expenditure for UNFICYP has now reached \$110,000,000, and the Secretary General is hard pressed to find voluntary contributions to keep the force afloat. Hence this situation, which stems from the initial improvisation characteristic of all peacekeeping operations, could have some bearing on the Force's future.

### III. HOW THE FORCE OPERATES

UNFICYP was established to prevent the recurrence of intercommunal conflict in a confined geographical space, with mainland Greek and Turkish forces in close proximity to the Cypriot antagonists. Its mandate is defined in usefully broad terms in the 1964 Security Council resolution:

"... in the interest of preserving international peace and security, to use its best efforts to prevent a recurrence of fighting and, as necessary, to contribute to the maintenance and restoration of law and order and a return to normal conditions."

The Force has carried out its mission essentially by interposing itself between the military forces of the two sides. It occupies scores of static posts between the lines, and patrols routinely, or otherwise inspects, not only the zones of confrontation but any other parts of the island where trouble might be brewing or unusual military preparations might be in train. It is a quick reaction force. It disposes of helicopters as well as armored and unarmored personnel vehicles. It is constantly on a two-hour alert, to reach any part of the island, and in times of tension this period is shortened.

The element of timing is important. Shooting incidents are investigated before they can build up. Complaints of a change in the military *status quo* are promptly taken up and solutions negotiated out. Impending actions by edgy or cocky commanders are hampered by ingenious methods of positioning men or matériel, when they cannot be averted by discussion. It is interesting to observe how much restraining influence can be exercised by a Force whose rules of engagement limit it strictly to self-defense with minimum force. Moreover, the mere fact that UNFICYP is available to receive complaints concerning an opponents's activities gives each party an attractive alternative to a direct military response to real or imagined grievances.

Thus UNFICYP Commanders are in a sense magistrates and diplomats, as well as soldiers. There is an expertise in day-to-day peacekeeping, and it is abundantly visible in the daily grist of incidents in the UNFICYP log.

What is most noticeable is that the United Nations in Cyprus has had the wisdom to construe broadly what was already a broad and general mandate. Its police components (UNCIVPOL) help to settle a wide range of police-type problems involving individuals and/or officials of the two communities. Its economic officers help to deal with intercommunal disputes over land use, road maintenance, housing and employment problems. The habit of resort to UNFICYP by an aggrieved party is now well

ingrained throughout the island. When settlements cannot be arranged by action officers, they are taken up at a political level, in the first instance through a Political Liaison Committee and if necessary at successively higher levels, to the Special Representative of the Secretary General at the top.

In evaluating these activities, perspective is important. UNFICYP has been markedly successful, especially in recent years, in preventing the escalation of hundreds of incidents to the point where serious consequences might follow. But like the contestants themselves, it has had to live with some situations that are far from satisfactory. And, despite the best efforts of the Secretary General's able Special Representative (Bibiano Osorio-Tafall), progress toward "a return to normal conditions" has been limited. The residue of suspicion and fear is still too strong for Cyprus yet to become a single political, economic or social unit.

#### IV. REQUIREMENTS FOR SUCCESSFUL PEACEKEEPING

From the foregoing it should be evident that peacekeeping as practiced in Cyprus is a rather special product of the United Nations effort to maintain and restore international peace and security. Opportunities for its use are obviously somewhat restricted. To institute it, either a formal cease-fire or a tacit willingness to stop fighting on both sides is first required. Knowledge that an impartial peacekeeping force will be available may in itself help to induce the parties to agree to halt hostilities.

Once instituted, such peacekeeping, through the use of military units with high visibility and mobility, carries an impact surpassing that of peace observation, in which only small officer teams would be involved. On the other hand, it carries no overtones of enforcement action. It is generally rooted in Chapter VI of the United Nations Charter, as ancillary to political settlement, rather than in Chapter VII. Its existence is dependent on the consent of the parties and on a substantial United Nations political consensus.

However individuals may feel about it, we cannot realistically expect the requirement for consent to be abandoned. But perhaps something can be done to clarify the question: "Whose consent?" The United Nations Emergency Force in Sinai was stationed exclusively on the territory of a single country, and that country was able to have it withdrawn on its unilateral request. UNFICYP is stationed in territory controlled by each of the two sides, and its mandate is periodically reviewed by the Security Council. This suggests that if a single party should ask that UNFICYP go home, the Security Council ought to be consulted before any such action is taken. It also suggests that, for future peacekeeping ventures, the parties should be asked to agree at the outset to some such restraint on sudden or arbitrary demands that United Nations troops be withdrawn. On the other side of the ledger, countries contributing contingents to peacekeeping forces might agree to a self-denying limitation which would preclude the precipitate withdrawal of their men.

Another factor—speed in organization—is also important. A cease-fire negotiated between warring forces is likely to be precarious; the peacekeepers are likely to be needed quickly. Fortunately, the United Nations has had practical experience in establishing peacekeeping forces, for UNEF, for ONUC, and for UNFICYP. Individuals schooled in these operations are available for future eventualities. Moreover, there exists a group of states predisposed toward participation in United Nations peacekeeping operations and capable of providing contingents on short notice for United Nations service.

The need for speed creates a need for advance military and technical preparations, by Member States and by the United Nations Secretariat. Much can be done in spite of the wide variation among individual cases. The problem of timing suggests that states likely to be acceptable as contributors to peacekeeping forces should be encouraged to make their own advance plans, earmark appropriate contingents, explore ways of meeting logistical needs, clarify their position on how costs shall be covered, examine any domestic legal problems involved in justifying and approving peacekeeping missions, and think through all the other aspects of a peacekeeping enterprise. Improvisation has worked wonders in United Nations military operations in the past, but it has also been expensive; and it has established patterns it was later politically impossible to change.

#### V. GUIDELINES FOR FUTURE CASES

The UNFICYP experience suggests some other guidelines to be pondered for future peacekeeping cases.

One is the utility of drawing the mandate for any new force in broad, flexible terms. If a peacekeeping job is worth doing, it is worth doing with thoroughness and resolution. Observation alone is not enough. A United Nations Force marches on its psychological standing with the antagonists it helps to restrain. It needs leaders and men who are not fettered by highly restrictive terms of reference—men who can use firmness, sensitivity, intuition, tact and ingenuity to maneuver within the Force mandate to keep the peace. UNFICYP has been singularly fortunate in regard to both the mandate and the men. The proof lies in the pervasiveness of UNFICYP activity in the island, the heavy dependence of both sides on it to settle disputes and problems in almost every aspect of day-to-day intercommunal relations, and the morale and élan of the Force members.

A second point is the need to play the peacekeeping game on both the military and the political front simultaneously. Immediately, this means that as incidents or problems are seen to be impossible to settle at the company or contingent level, or by the United Nations civilian police or the contingent economic officers, they are brought to UNFICYP Headquarters and then raised with the political leaders of one or both sides. There is thus a very definite place for a Special Representative of the Secretary General and for a skilled Political Adviser with constant access to each side.

In Cyprus, the Special Representative has frequently taken the initiative with the parties to seek arrangements for more normal conditions of life by eliminating intercommunal barriers, returning refugees to their homes, and ending other practices which tend to range one community against the other. There has been some success in these endeavors and, if conditions of stability are maintained, there is hope for more. The Special Representative can exert influence looking toward normalization which is at least as effective as that of the diplomatic community.

A Special Representative may be tempted to go further, and to offer his good offices to assist in reaching a settlement of the basic problem. If he proceeds carefully, he has the glittering prospect of gaining the peace-maker's accolade. But there are pitfalls. A mediation effort, such as the one undertaken under the 1964 Cyprus resolution, is on the averages a low probability operation. It is a high-risk operation in terms of the mediator's future utility on the local scene. A Special Representative cannot afford to expend his political capital by pushing his peacemaking too far.

A third observation on the peacekeeping process as it has worked in Cyprus is the desirability of giving the United Nations Secretary General broad executive authority to organize and direct the entire operation, within the terms of the Force mandate, subject only to general supervision by the Security Council or the General Assembly. This is a cardinal element of good executive and administrative management. Of course the Secretary General should, and will want to, consult on major matters with the interested parties and the troop contributors. As an invariable major financial contributor, the United States might legitimately claim a similar consultative status. But it is hard to see how a peacekeeping enterprise could function effectively under the requirement for meticulous, step-by-step Security Council approval of administrative matters the Soviet Union seems to desire. A peacekeeping mission dependent on political decisions of the Security Council for executive direction would be a mission destined to die of rigidity and restraint in very short order.

This is not to state that the authorizing United Nations organ should not be able to review the work of the United Nations Force periodically. Clearly, it must do so. The semi-annual Cyprus debate in the Security Council provides an opportunity to reassess the Cyprus problem generally on the basis of the Secretary General's latest report, to hear the parties, to elicit the views of Security Council members on any aspect of the Force's work or the general situation, and to renew United Nations support. At times the meetings seem fairly routine. In other peacekeeping cases, an annual review might well be sufficient, with special meetings whenever desired. United Nations history does not encourage the hope that peacekeeping operations will often be short-lived.

#### VI. FINANCING—A CONSTANT BUGABOO

It becomes especially important, therefore, to find ways to ensure that peacekeeping, a very high-cost operation in international organization terms, can be dependably and fully financed over an indeterminate period.



The Congo experience ended, at least for the present, the possibility of paying for large-scale peacekeeping missions by mandatory assessments on United Nations Members. The alternative is voluntary support, as in the Cyprus case. Such support may be forthcoming because a sufficient number of large contributors have a direct interest in discouraging violence in the area involved. More generally, support may reflect a contributor's desire to encourage resort to United Nations peacekeeping as a useful international security technique.

As regards Cyprus, broad political interest doubtless goes far to explain why the United States has met 40 percent of the United Nations peacekeeping bill; why the United Kingdom has met about 20 percent; and why other countries closely concerned have continued to contribute year after year. If voluntary support is to remain the basis of United Nations peacekeeping, it seems reasonable to assume that missions will only be undertaken when one or more major contributors is willing to foot the bulk of the bill. Small numbers of observers may be sent anywhere within the United Nations' regular budget limits, if the political circumstances are right. But the reliable and equitable financing of large, open-ended peacekeeping operations under any practicable financing pattern will require the broadest possible sharing of costs, with major United Nations contributors undertaking to pay a high proportion of the total expenses.

There are some things that can be done to make even a voluntary system more dependable.

Suggestions have been made for a "Peace Fund" into which voluntary contributions would be made so that a nest egg might be available for future peacekeeping cases. Such a Fund would be useful, in a limited way, as a start-up device for the initial phase of operations and to supplement other means of financing. It would be no substitute for more systematic, reliable methods; indeed, it might even in some cases discourage certain potential contributors from offering financial support on the plea that the Peace Fund can take care of the bills. On balance, however, before a more permanent cost-sharing scheme is adopted, the Peace Fund could help ensure that an operation is not delayed for lack of ready resources.

An additional suggestion for meeting peacekeeping costs on a voluntary basis has been the adoption of a model scale of apportionment as a guide to Member contributors. Such a scale would reflect the general recognition, born of the heavy expenses of the Congo operation, that the larger contributors should bear virtually all the costs, with the more indigent developing countries restricted to what approaches token contributions. Again, the benefits to be expected from such a scale providing for equitable but non-obligatory contributions are rather limited, though in the later phases of the U.N. Emergency Force such an allocation system produced contributions from half the U.N. membership. Apart from the financial benefits, an allocation system can become a vehicle for manifesting broad political support for a peacekeeping initiative, even though many small nations are required to make only very small contributions.

Nonetheless the situation remains basically unsatisfactory. In the Cyprus case as in others, the Soviet Union insists that the voluntary principle be preserved. The U.S.S.R. has never contributed to any major United Nations peacekeeping operation. Other United Nations Members, without sharing the Soviet and French doctrinal difficulties with peacekeeping assessments, simply will not or cannot make appreciable contributions for activities which occur far from their shores and which produce no benefits directly to them.

The Secretary General must therefore anticipate that he will have to make repeated appeals to Member States for contributions. As regards Cyprus, he has often expressed his concern over this situation. With an expenditure by the United Nations of some \$110,000,000 over a five and three-quarter-year period ending in December, 1969, a deficit of over \$7,500,000 exists in the Cyprus Special Account. Only about one third of the United Nations Members have made any contribution for Cyprus at all. And if the political situation in Cyprus should remain substantially unchanged, it is hard to see what new incentive there could be for increased contributions to prevent the deficit from growing. On the contrary, it is possible that the interest of contributors, whether in the form of money or troops, could flag, or that because of pressing emergencies elsewhere contributors might feel themselves unable to continue their participation at present levels.

Thus we must expect voluntarily supported peacekeeping operations to be chronically underfinanced and therefore to have an uncertain future. This only reinforces the need for a continuing search for economies. In the Cyprus case, the interest of contributors in cost-cutting resulted last autumn in a most useful cost-effectiveness study. The study led to a reorganization and redeployment plan under which UNFICYP manpower has been further reduced by about 10 percent to a figure of about 3,100 men.

Assuming continued intercommunal calm, the study indicates the possibility of gradual progress toward conversion to a much smaller operation carried out by highly mobile military observers and a civilian police component. Given some years of political calm, UNFICYP might be able safely to fade away. But it would be reckless to remove it now. The psychological effect of the tangible, constant presence of UNFICYP is a primary element in the maintenance of peace in Cyprus.

## VII. PEACEKEEPING IN FUTURE

We know enough now about United Nations peacekeeping to know that it will work, just as long as it rests on a basis of consent, eschews enforcement action to impose a political settlement, and commands sufficient support in the United Nations community. It is a technique of collective action in the interest of peace, and there are men who are knowledgeable in its management.

At the same time, it is significant that in a world studded with conflict, Cyprus is today the only country in which a United Nations peacekeeping force is stationed. Peacekeeping requires a particular climate. The

physical and political conditions for its use are unlikely to exist during "wars of liberation." Nor will they exist in the wake of such wars unless these can be halted short of the complete triumph of one side or the other. Even in that event, it would take very special circumstances in a Vietnam-type situation to overcome the Communist antipathy to the injection of an impartial, effective third party or a United Nations presence on the scale required. In conflicts within the scope of strong regional organizations, peacekeeping could perhaps develop as a regional product, although our experience is still scanty in this regard.

All in all, it seems reasonable to envisage United Nations peacekeeping as most promising in local conflicts where the great Powers share an overriding interest in avoiding escalation and embroilment, or where their primary interest is to insulate the conflict area, and where the ideological factor is not paramount. In such circumstances there is a definite rôle for the interposition of a politically disinterested peacekeeping force. I have not the slightest idea how or when the Arab-Israeli conflict will end but, just as in 1957, United Nations peacekeeping may well serve a useful purpose there.

In the United Nations the General Assembly's Special Committee on Peacekeeping Operations (the so-called Committee of Thirty-Three) is making a comprehensive review of the whole question of peacekeeping operations in all their aspects. If we are indeed entering a period of East-West negotiations, the Committee might be able through Western and Soviet agreement to reach a new understanding on how the United Nations can arrange, conduct, and finance future peacekeeping operations, large and small. A major objective of the United States in any such negotiations would certainly be to establish a more secure foundation for financing and managing such operations.

With movement in this direction, it might be possible to heal some of the wounds caused by the Congo experience, and to hope for a new consensual basis for United Nations peacekeeping. We would still be very far from a system in which peacekeeping was linked with peacemaking—in which the acceptance of third-party intercession to police a cease-fire was followed by the acceptance of third-party judgment to reach a settlement. But we would be moving toward agreement on an orderly process of international adjustment. And as things stand today, that would be no small matter.

## SOME PERSPECTIVES ON PEACEKEEPING INSTITUTIONS

*By Larry L. Fakian \**

The United Nations' career as a peacekeeper has displayed two distinct but closely related faces, one responsive to the present, the other

\* The Brookings Institution.

trying to be attentive to the future. The world organization has attempted to be both a provider and a preparer: it has provided peacekeeping assistance in specific crises, and also has done what it could to prepare for unknown ones yet to erupt. The first rôle has been the more conspicuous, dramatic, and insistent. In some dozen cases since the mission to Greece in 1946–1947, the Security Council or the General Assembly have dispatched observers or larger military units to perform politically impartial and generally non-coercive peacekeeping chores. The second, usually less visible, face has consisted of a substratum of efforts, carried on erratically but often energetically. These aim at fashioning basic peacekeeping institutions capable of outliving individual emergencies, flexible enough to anticipate diverse needs, and comprehensive enough to minimize the much-lamented improvisation in United Nations operations. Numerous campaigns to build such durable institutions have left an historical record badly pockmarked with failures. Although some groundwork has been laid, the United Nations still lacks—still is denied by its Members—an adequate system of what I shall label “preparedness for peacekeeping.” Yet this same historical record is sprinkled with lessons of continuing relevance, inasmuch as the pursuit of a qualitatively improved system of preparedness seems certain to be sustained into the United Nations’ second quarter-century. In focusing my remarks primarily on this second face of peacekeeping, I intend to sketch briefly the important currents in the experience of the past 25 years, to review its lessons, and to suggest some desiderata for thinking about United Nations preparedness in the future.<sup>1</sup>

#### DIMENSIONS OF PREPAREDNESS

It is helpful to think of a preparedness system as a rather flexible notion, comprising multiple layers and types of activity that enable the United Nations to muster human and material resources needed for peacekeeping operations. At its most mundane, nuts-and-bolts level, it is a complex network of advance technical arrangements and understandings at the United Nations and within or among Member States. In this dimension, preparedness involves three components: an ability to mobilize appropriately skilled and politically acceptable military manpower, for example, through call-up of national standby forces; an ability to depend on the Secretary General and his political and administrative staffs to manage these operations; and finally an ability to marshal the requisite logistical support.

There is also another dimension, one that is essentially non-technical. This is the search for an effective diplomatic consensus about preparedness. Highly charged issues—which have for many years generated intense controversy—flow from a central, dominant question: Who exercises ultimate political responsibility for preparedness? Which United Nations body or which combination of states is to be decisively influential in controlling,

<sup>1</sup> I have examined the subject of U.N. preparedness in detail in a forthcoming book, *Soldiers Without Enemies: The Preparedness of United Nations Peacekeepers* (The Brookings Institution, 1970).

devising, paying for, and overseeing the execution of preparedness policies and programs? How much of this responsibility is to be centralized in New York? How much left to informal groupings of interested member governments, and with what blessings from the United Nations? What, in short, will be the political ground rules that ultimately determine how peacekeeping operations will be prepared for and managed?

As the United Nations enters this commemorative year, renewed attention is being given to some of these fundamentals. I am referring to the ongoing efforts within the Assembly's so-called Committee of 33 to reach agreement on formulas and guidelines for future peacekeeping. Few would quarrel with the assertion that results so far have been minimal and unspectacular. What is not so obvious is how to assess the forward movement that undeniably has occurred. An optimist hoping to detect harbingers of a genuine breakthrough might take comfort from one participant Ambassador's claim last October that more had been accomplished in the previous six months than in the preceding twenty years.<sup>2</sup> The skeptic or the pessimist could reply that this says less about new progress than about the barrenness of the past, that the Committee of 33 is but the latest in a long line of collective tinkers that have hoped to unclog the dreary impasse over peacekeeping rules, and that it has resolved only a small fraction of relatively easy issues. I shall mention these negotiations again, but against the backdrop of what has gone before them on the much broader landscape of preparedness, in both of its key dimensions.

#### PREPAREDNESS IN RETROSPECT

Since I am more interested in isolating the most instructive lessons from relevant history than in emphasizing its detailed contours, I will state three at the outset.

First, to understand why the United Nations system of preparedness is deficient, we must look not mainly at its technical dimension but at its political one. There is vastly more technical know-how about preparedness than there is diplomatic consensus to use it. Available today in abundance are all manner of blueprints for permanent and semi-permanent U.N. forces, schemata for military planning staffs at the Secretariat, curricula for international training, suggestions for easing logistical burdens, and ideas for using new technologies—for example, surveillance and monitoring devices—in the service of U.N. peacekeeping objectives. These are mostly gathering dust somewhere, not because they lack intrinsic merit, for some are quite sensible, but rather because they are not judged solely or even largely for their reasonableness or technical sufficiency. Instead they are measured carefully against national preferences on questions of political responsibility for preparedness. Arguments about how or whether to tackle many technical problems are really over where to locate the political controls. "Who does it?" is often a more crucial question than "what needs to be done?" Technical solutions can be nurtured

<sup>2</sup> Remarks of the Canadian Ambassador to the United Nations, reported in U.N. Doc. A/AC.121/SR.41, Nov. 4, 1969, p. 3.

only within the boundaries of political tolerances, which are sometimes more, sometimes less malleable. Skillful probing, stretching, and exploiting of these limits by Secretaries General and by concerned governments have occasionally been productive.

Second, a system of preparedness follows rather than precedes understandings about the purposes to which the system will be put. Whether in the sphere of collective enforcement according to Chapter VII of the Charter or in what has come to be called consensual peacekeeping, preparedness has never been politically viable in the abstract. It is abundantly clear from past experience that failure is guaranteed for attempts to erect an edifice of preparedness when its apparent purposes are unacceptable to the major actors whose political power is decisive, or too open-ended and ambiguous to elicit their sustained approval. In particular, satisfaction must generally extend to the permanent members of the Security Council and those Member States that, by setting aside troops or other facilities, are active participants in the preparedness system.

Third, preparedness institutions are not merely reflectors or barometers of the quality of diplomatic consensus. They also can be instruments for molding it. In a positive direction, for example, they can be used to create assurances that the system will be employed only for agreed purposes, and to communicate national views about preparedness and peacekeeping. As counterpoint, of course, governments will continue to press for those institutional formulas that provide them with what they regard as sufficient influence over preparedness policies.

Preparedness has evolved over several historical stages, each a kind of generational divide leaving a slightly different residue of insights into the problems of creating a system that is both technically adequate and politically responsive.

*Stage I: 1945-1955.* During this decade two preparedness systems were cultivated. At its close one had languished, the other remained embryonic. The first was to facilitate the operation of collective enforcement. Articles 43 and 47 of Chapter VII were to govern (a) the call-up of national military units in accordance with special agreements negotiated with the Security Council, and (b) the functioning of the Council's Military Staff Committee, which is composed of the Big Five Chiefs of Staff or their representatives. Dissipation of wartime unity produced, by 1947, total deadlock over the implementation of these provisions. The Uniting for Peace Resolution of 1950 was designed by its American sponsors to be a functional substitute for this dormant Charter machinery. A stepchild as well as a casualty of the Cold War, the resolution also authorized a preparedness system of its own, with call-up procedures and a military experts' committee. When a sanctions-related planning group created by the resolution closed its doors in 1954, the quest for a system of preparedness for collective enforcement came to an end.

Meanwhile, a preparedness system for consensual peacekeeping had already begun to take root. The Secretariat was developing skeleton capabilities for impartially managing and administering field missions like

those in Greece, Palestine, Indonesia, and Kashmir. A handful of governments were learning to prepare military officers for United Nations observer duty. But the record of preparedness diplomacy in this era was dismal. Trygve Lie campaigned tenaciously for various forms of pre-planning and institutionalization—his pet scheme for a U.N. Guard was one such idea. Yet he achieved in the end only a bureaucratic consolidation in the Secretariat that resulted in the creation of the still-active Field Operations Service.

*Stage II: 1956–1964.* A rapid succession of peacekeeping operations spurred additional expansion of Secretariat resources, although political and financial impediments kept them woefully substandard. As in the early years, critical logistical backup was provided by the United States. What was novel after 1956 was the emergence of a core group of states, mostly middle Powers, that became indispensable suppliers of large numbers of peacekeeping personnel. Canada, the four Nordic countries, Ireland and India were among the most active. Their credentials as peacekeepers rested on their military skills and on characteristics that made them politically acceptable: no significant political or economic interests in Third-World arenas of conflict, no prejudicial colonial histories, an identification with active and independent internationalism, and strong support for the United Nations' peace and security functions.

Preparedness diplomacy in this period was largely a product of United Nations interchange with these middle Powers. Dag Hammarskjöld and Lester Pearson were central figures. They elaborated fresh proposals for advance arrangements within national military establishments, including the creation of standby peacekeeping forces. They urged new Secretariat reforms in planning and staffing; and further refinements in peacekeeping training and orientation.

Profound disagreement over peacekeeping during this period, however, prevented such projects from receiving an official United Nations imprimatur. The Congo episode, the Soviet vendetta against Hammarskjöld and his office, the burgeoning financial and constitutional crisis—each took its toll on preparedness by forcing it, in a sense, underground. Basic Secretariat reforms were deferred, and preparedness took on a “do-it-ourselves” flavor among interested governments. Only occasionally was the Secretariat able to give quiet and informal encouragement to the middle Powers. Nevertheless, some constructive results were generated. Plans for a standby force had jelled in Canada, were being actively developed in Nordic states, and were attracting the keen interest of others like Austria and The Netherlands.

Most of these governments announced decisions in 1963–1964 to set up United Nations standby contingents, offers that were unilaterally communicated to the Secretary General. An important experiment in preparedness diplomacy marked the end of this second stage. To remedy the patchwork pattern of national activities, Pearson vigorously pressed a new strategy. He encouraged interested states to act in concert by co-ordinating their separate programs *outside* formal United Nations chan-

nels. His move was overly ambitious and mis-timed. Even some of the peacekeeping states doubted its wisdom, and it ran headlong into the shockwaves of the looming Article 19 crisis. Strong criticism from Moscow—because the proposed co-ordination would have effectively removed this preparedness initiative from Soviet leverage at the United Nations—was instrumental in forcing Pearson to modify his design drastically. The venture ended as a limited-purpose technical conference in Ottawa at which 23 governments exchanged specialized information in late 1964.

*Stage III: 1965–the present.* On a practical level, the current period has been limited to rather low-key activity, mostly in national frameworks. In the dozen or so countries that have announced standby programs, implementation has been very uneven. In a few cases standby units are fully organized. In a few others no follow-through has been made since the initial offers were promised. In most, the work on these complicated and difficult programs remains in one or another phase of partial completion. Much has been learned from these efforts and from continuing participation in ongoing missions by many of these countries. But the creation of an effective aggregate of national standby forces is still in the future.

There has been some multinational preparedness co-operation, though on a scale much less extensive than Pearson might have preferred earlier. It is concentrated today largely in the Nordic area, where, apparently without Soviet objections, joint schooling for individuals earmarked for peacekeeping service is fairly well developed. Non-Nordic students have participated in recent years.

On the whole, however, this third generation has disappointed proponents of improved preparedness. The momentum of the early 1960's has waned. The malaise spawned by the Article 19 controversy—Ambassador Yost recently dubbed this mood a “disastrous hangover”—was pervasive. The Committee of 33 made no progress initially. A major diplomatic proposal for dealing with constitutional and financial issues was squelched by the Soviet Union and France at the 1966 General Assembly. The Secretary General abolished his Military Adviser's Office. Countries with reputations as enthusiastic backers of peacekeeping seemed to become increasingly disillusioned, especially after the demise of the U.N. Emergency Force in 1967.

#### PREPAREDNESS DIPLOMACY IN TRANSITION

The Committee of 33 is trying to reverse this pattern of immobilism at a time when new ingredients are at work in preparedness diplomacy. Attention no longer centers on devising ways for a Secretary General, or a prominent national statesman, or collectively concerned middle Powers, to maneuver gingerly around an American-Soviet stand-off on peacekeeping issues. Attention now centers instead squarely on these two protagonists. The implications of the Article 19 crisis and of the failure of the diplomatic initiative at the 1966 Assembly are inescapable: neither super-Power's concepts about peacekeeping can prevail over the other's determined resistance, and preparedness institutions cannot be substantially



strengthened without identifiable consensus between them as a minimum permissive condition. That these assumptions are the controlling ones in the Committee's current work is the most significant feature of contemporary preparedness diplomacy. There is, however, a brake on dramatic initiatives independent of these negotiations. The process is conservative and slow-moving, but fully consistent with political realities at the United Nations.

It is too early to tell whether our optimist, our pessimist, or our skeptic is giving us a solid prognosis. One thing is certain. Genuine bargaining between the super-Powers over preparedness matters is taking place in a limited but meaningful context. This is a new phenomenon, replacing their customary dialogue of the deaf on these issues. Fundamental views and positions remain far apart. Compromises have thus far been relatively minor, yet they have been mutual and constructive. Neither insists on packages that the other has always dismissed as unacceptable. Both are willing to sidestep, for the time being at least, some of the most troublesome constitutional arguments about peacekeeping.

At this juncture, these shifts in orientation and style are perhaps more promising than the modest practical progress that has been made concerning guidelines on preparing for and managing future observer missions. The agenda facing architects of another generation of United Nations preparedness is long, and likely to tax their practical ingenuity and their willingness to consider basic political trade-offs. Several balances will have to be struck, each of them highly problematic. Effective Secretariat preparedness is essential, but so is the need to alleviate the Soviet Union's historically and ideologically grounded mistrust of strong capabilities in the hands of any Secretary General. Adequate great-Power controls over the structure of the preparedness system are essential, but so is the need to insulate the system, to some degree, from their constant intervention, and to give it a pulse of its own by assuring extensive participation of middle Powers and others on whom the system depends for active support. Reasonably precise understandings about the relevant powers of the Security Council are essential, but so is the retention of a flexibility that anticipates the seating of a potentially obstructive mainland China on the Council.

These competing interests stand the best chance of being adjusted and blended if preparedness diplomacy is kept within the rubric of consensual, voluntary peacekeeping. Whatever merit there may be to the oft-heard suggestion that the United Nations set its sights again on establishing collective enforcement machinery or coercive capabilities by some other name, this is no argument for attempting to graft such purposes onto the preparedness institutions that have evolved for peacekeeping. There is every indication that they would collapse under the load. Witness—to cite only one example—the firm insistence by nearly all standby countries that their commitments are intended *exclusively* for consensual operations. Any assumption that a single preparedness system could simultaneously serve these two masters is highly questionable.

But this should not be confused with another possibility that does deserve serious exploration and study; namely, the question of whether Charter-based institutions, Article 43 and the Military Staff Committee, originally intended for collective enforcement, ought to be adapted to contemporary peacekeeping purposes. In the first half of the 1960's this idea was raised rather vaguely and cryptically by the Soviet Union as a direct defensive reaction to Pearson's proposals for going outside United Nations channels. It was also a way of underscoring, in the heated constitutional debate, Moscow's traditional demand for total control by the Security Council of all preparedness affairs. The idea was rejected by most Western governments and peacekeeping supporters as a patent attempt to harness the Secretary General to the Security Council.

It now may be time to reconsider this approach in a calmer, more positive atmosphere. It seems worth asking whether reactivating these institutions could, without jeopardizing the independent and unified executive authority of the Secretary General, encourage greater Soviet trust and confidence in the preparedness system, and provide a planning and advisory framework within which peacekeeping countries and great Powers could co-operate. It appears that this reasoning, in part, underlies one recommendation in last year's well-publicized peacekeeping panel report of the United Nations Association of the U.S.A.,<sup>3</sup> which urged an enhanced rôle for an expanded Military Staff Committee as a purely advisory body to the Security Council.

If "old" institutions cannot be revamped for new purposes, perhaps it will be necessary, as one Committee of 33 Ambassadors recently pointed out,<sup>4</sup> to create new institutions at the United Nations to deal exclusively with preparedness. In either case it is clear that the current stirrings in the Committee of 33 are best viewed as transitional, though important. If they are fruitful, if general guidelines for future peacekeeping are agreed upon, it all will have been only a prelude to longer and even more difficult bargaining about the shape of future preparedness.

## REMARKS OF MAJOR GENERAL INDAR JIT RIKHYE \*

Major General RIKHYE, speaking extemporaneously, reminded the audience that when Mr. Fabian referred to the office of the Military Adviser at the United Nations being abolished, he was actually saying that he (General Rikhye) had been abolished. He was happy to have served the Secretary General in this capacity from 1960-1968. But he was also happy to now have the opportunity to participate in discussions of this sort which

<sup>3</sup> United Nations Association of the United States of America. *Controlling Conflicts in the 1970s: A Report of a National Policy Panel . . .* 44 (New York, 1969).

<sup>4</sup> Remarks of the Canadian Ambassador to the United Nations, reported in U.N. Doc. A/AC.121/SR.29, Nov. 7, 1969, p. 6.

\* Former Military Adviser to the U.N. Secretary General, and Commander, United Nations Emergency Force.

he feels are of vital importance—discussions on how to strengthen United Nations peacekeeping.

General RIKHYE felt that one area which needs further study is the determination of an appropriate definition of "self-defense." This problem arose most critically in the Congo experience where 124 U.N. soldiers were killed and 200 wounded. What did this group think should be the limits of self-defense?

Another question which is important for the efficient functioning of U.N. forces is the extent of involvement of these forces in the internal situation, that is, in such matters as providing mass relief and assisting refugees. These are indicative of the enormous problems which confront the United Nations in the course of a peacekeeping operation, but with which the United Nations is not always adequately prepared to deal.

Another area which needs further examination is the issue of consent, and the right of withdrawal of U.N. forces. Consent operations are vital, but what can be done to remedy the kind of situation that resulted in the withdrawal of UNEF?

Status of forces agreements between the United Nations and the host country are another important aspect of U.N. peacekeeping operations, particularly as they relate to freedom of movement of U.N. forces. The difficulty with the freedom of movement concept is in its implementation. Freedom of movement can and has been refused and limited by the host countries even when it had been previously agreed to in the status of forces agreements. This has greatly complicated the task of U.N. forces in carrying out their peacekeeping responsibilities.

The purpose of U.N. forces in a peacekeeping operation is in large part creating a U.N. presence to act as a deterrent. The degree of its effectiveness depends upon the size of the force and its ability to operate. Here General RIKHYE agreed with Ambassador Popper's reference to the importance of the mobility of a U.N. force, as, for example, in Cyprus where the U.N. force is able to reach any area on the island within two hours. How can we use the concept of U.N. presence as a deterrent more effectively in the future?

General RIKHYE also asked the group to consider the rôle of great Powers in future peacekeeping operations. U.N. peacekeeping requires the tacit agreement between the two super-Powers not to participate directly, yet logistical support of the super-Powers (for example, U. S. air support in helping to end the Katanga secession) is often essential. General RIKHYE asked Ambassador Popper why it was he felt Great Britain was able to become involved in the U.N. peacekeeping operation on Cyprus? On the subject of the Committee of 33, General RIKHYE commented that they seemed to be moving forward on some issues, while avoiding the more constitutional questions. However, their work is not likely to affect actual preparedness on future peacekeeping questions. Is there any way we can move forward more quickly on technical preparedness?

Ambassador POPPER, in replying to General Rikhye's question concerning U.K. participation in the Cyprus force, thought there were not too

many conclusions one could draw from the Cyprus experience, since there were unique circumstances in that situation. The United Kingdom had been responsible for security on the island for almost a hundred years. They had the only large military force there at the time of independence, as well as bases, and their continued presence was sanctioned in the London-Zurich Agreements. It was particularly convenient and appropriate, therefore, for them to stay on and participate in the U.N. force. Ambassador POPPER doubted whether this kind of situation will ever be duplicated. He was of the opinion that the great Powers are reluctant to participate in U.N. peacekeeping and would continue to look for ways to avoid becoming directly involved. It is probably better not to envisage them in future U.N. peacekeeping operations.

The CHAIRMAN thought it would be useful to stay with this issue of great-Power participation, and solicited questions from the floor. If there is to be a force in the Middle East, should this include great-Power participation?

Professor VED NANDA asked what the rôle of regional arrangements is in relation to U.N. peacekeeping. Would Ambassador Popper see the United Nations operating in regional areas in the future?

Ambassador POPPER responded that regional organizations have not been too successful in dealing with conflict situations in the past. Still, they are trying to maintain their primacy of action in interregional disputes. He doubts that they would ask the United Nations to step into these kinds of situations even though they do not have large forces. It may be that the kind of collaboration envisaged between regional organizations and the United Nations as envisaged in the Charter is some time ahead.

Mr. FABIAN thought that a major variable in dealing with conflict situations in this Hemisphere is the stance which the United States takes. In the Dominican Republic, for example, the action of the United States has taken the steam out of the development of regional peacekeeping capabilities. This does not mean that in the future the United States has to remain totally uninvolved but, if the Organization of American States is to increase its peacekeeping capacity, the United States will probably need to lower its profile.

The CHAIRMAN asked General Rikhye, as a former special representative of the Secretary General in the Dominican Republic, to comment.

General RIKHYE said that the United Nations was in the Dominican Republic as observers, but not silent observers. He felt that the effect of the U.N. presence was prominent in two ways. One, in a perhaps backhanded way, it helped the O.A.S. to keep peace through the reports which it sent to the Secretary General, who in turn circulated them to the Security Council. These helped to clarify the situation. Second, in the human rights area, the United Nations helped to develop a new system of investigating complaints, sometimes at great risk to U.N. personnel. They were assisted in their task by the mass media, which helped to give publicity to situations in which investigatory teams were refused access to certain areas.

Mr. RICHARD DONOVAN asked how greater involvement of the Security

Council could help in crisis situations when there are opposing interests within the Security Council membership itself.

Mr. FABIAN responded that there is no question that Security Council action involving the United Nations in a peacekeeping operation is difficult unless there is basic great-Power agreement. But that agreement may well rest on ambiguous grounds, on overlapping common and divergent interests. Sometimes agreement is possible only on negative issues, but there is really no way around this.

The CHAIRMAN asked Ambassador Popper whether he saw any increase of common interests developing between the super-Powers in dealing with conflict situations.

Ambassador POPPER replied that this was difficult to answer concretely. It is likely, since the great Powers do not want these issues to become matters of controversy between themselves—the Congo is a good example. The United States agrees that present U.N. peacekeeping is better than any other. It would be worth while exploring how much agreement on common interests could be reached through various U.N. agencies.

Professor CARL CHRISTOL asked whether, if the major Powers had been involved in UNEF, the United Nations would have been able to withstand the precipitate withdrawal—granting the right of the U.A.R. to demand it.

General RIKHYE said he had no comment.

Ambassador POPPER was not sure the great Powers in that type of situation would have wanted to persevere. The resulting situation might not have been beneficial to them; in fact, it is difficult to see how it could have been.

The CHAIRMAN mentioned that in the current Middle East situation, there has been discussion of the possibility of the United States and the U.S.S.R. becoming more directly involved. It has also been suggested that contingents from Czechoslovakia and other East European countries might participate in future U.N. peacekeeping operations.

Mr. LYNN MILLER suggested that the purpose of peacekeeping operations is to keep Cold War issues out. It is difficult therefore to see how inviting the super-Powers to participate would be helpful. He asked Mr. Fabian whether, in view of the past U.N. practice and the historical reluctance of the U.S.S.R. to become involved in U.N. peacekeeping, it is possible to achieve Soviet participation in future peacekeeping operations. Could such participation be kept neutral?

Mr. FABIAN replied that two issues needed to be kept separate: actual supplying of peacekeeping troops by super-Powers, and their political participation in devising arrangements for controlling, managing, and financing peacekeeping operations. He, too, was skeptical about the wisdom of super-Power participation in the first sense. The more important issue today seems to be whether both super-Powers can exercise substantial influence over peacekeeping institutions. In his view it is appropriate that U.N. peacekeeping has been moving away from the U. S. imprimatur. For example, it is significant that both super-Powers are participating in the

work of the Committee of 33. There is a great deal being done in both public forums and private negotiations and a growing assumption that both super-Powers would participate in peacekeeping deliberations. Mr. FABIAN also commented on the Chairman's mention of possible East European contributions to peacekeeping forces, which he thought was an excellent point. This is particularly relevant, since offers have been made from both Czechoslovakia and Bulgaria. The United States is not willing to give the Soviets full participation under Article 43. But does the Soviet Union want to go that far anyway? A case could be made that the Soviets would compromise some on the issue of control. He doubted that they would try to tighten controls if given the opportunity. Neither the United States nor the Soviet Union is considering including their own contingents in peacekeeping operations. The question is how to share political responsibility over the peacekeeping system. One way to explore this is to talk about the Military Staff Committee. Such discussions should not be excluded by current discussions in the Committee of 33. This is a slow process, but he is not sure there is any way to move much faster.

The CHAIRMAN asked General Rikhye if he would care to comment on great-Power and East European involvement in peacekeeping.

General RIKHYE said it is a fact that the great Powers have been involved. On the question of actual participation, there are serious problems. One, as long as military forces are divided between the NATO and Warsaw Pact nations, it would be difficult to arrange and deploy forces in the field. The problems are not insurmountable but they are difficult. Two, what would be the effect of a confrontation in which an individual of one of the great Powers was killed? He did not think that the time was ripe for direct great-Power participation. Concerning participation of East Europeans, he thought this was a very good suggestion. Five or six such countries have written offering to make their troops available for future peacekeeping operations, although all of these have been related to Article 43.

Mr. JAMES STEGENGA said he would like to play the rôle of the devil's advocate and asked the panel to respond to the suggestion that there really was little future for U.N. peacekeeping because, first, peacekeeping efforts thus far had not really facilitated peacemaking very much but had, rather, inhibited it by calming tense situations and thereby eliminating the urgency of negotiating political settlements; and, second, peacekeeping has promoted settlements of partition that are not the kinds of settlements that governments of strife-torn states are apt to welcome in the future.

Ambassador POPPER responded that the alternatives to U.N. peacekeeping were rather appalling. He felt that peacekeeping offered the best platform for achieving peaceful settlement of disputes and that partition had not always been the solution.

The CHAIRMAN suggested the implication was that, if U.N. peacekeeping forces had been removed from Cyprus, this would have led to increased conflict and not acted as a spur to settlement.

Ambassador POPPER agreed.

Mr. FABIAN, responding to Mr. Stegenga's comments, suggested that we cannot have it both ways. That is, we cannot say that U.N. peacekeeping does not produce settlement and then say that the settlement which the United Nations produces is partition. To suggest that peacekeeping reduces the chances for peaceful settlement is in a sense to suggest that violence is necessarily constructive in such situations. This has not actually been proven, and there are good reasons to question its validity as a general proposition.

Professor CORNELIUS MURPHY suggested that there are no intrinsic antagonisms between peacekeeping and peacemaking. They are interrelated concepts. You cannot have one without the other. The question he wished to put to the panel is, to what extent is the United Nations, in its peacekeeping operations, devoting time to peacemaking?

Ambassador POPPER replied that in Cyprus they are very much interrelated. What is done in terms of peacekeeping is all the traffic will bear. The United Nations is limited by what the parties themselves are willing to do. Therefore, one pursues peacekeeping in the hope that changes will bring the parties together and that progress can then be made in peacemaking.

The CHAIRMAN mentioned that in Cyprus, in addition to the U.N. peacekeeping force, there is a Special U.N. Personal Representative of the Secretary General. Such a representative has not been the pattern in previous peacekeeping operations. Is this an advance in peacemaking? Is it an effective instrument?

Ambassador POPPER suggested that a political negotiator for the United Nations is very useful and that U.N. peacekeeping should not be limited to military devices alone. A personal representative of the Secretary General offers new opportunities for reaching accord between conflicting parties. Much of his success depends on his own personal status and his tools. But the concept is a good one and such a representative should be given wide latitude in which to operate.

Professor BASIL YANAKAKIS suggested there was some confusion in the use of peacekeeping terms, and suggested that some of this confusion might be avoided if the term "peace maintained" were used, stressing the fact that peace is there and simply being maintained. He asked Ambassador Popper if peacekeeping operations would not be more successful if the great Powers were behind the operations. Would not, for example, the Cyprus operation be more effective if the great Powers were involved?

Ambassador POPPER replied that it might be more helpful if there were greater concern by the great Powers for peacemaking.

Mr. ROBERT L. BARD pointed out that there is wide disparity between the types of conflicts which may be arising in the future, including the nature of their underlying causes. He mentioned the India-Pakistan dispute, the Middle East dispute and the Cyprus dispute as representative of different types of conflicts which could be placed on a continuum. Different kinds of disputes are differentially amenable to U.N. peacekeeping activities. Would it not be helpful to determine in advance the most ap-

appropriate rôle for the United Nations in dealing with these different kinds of disputes?

Mr. FABIAN replied that he was not sure how you measure the inherency of a conflict. Peacekeeping is a response to a specific situation and the susceptibility to United Nations involvement is relevant. In the first place the parties have to be willing to compromise (this is a minimum for U.N. peacekeeping involvement). Secondly, there has to be a need for an impartial third party. It may be that intra-state conflicts will be paramount in the future. The Cyprus situation is, of course, such an example and may be the pattern for future peacekeeping.

The CHAIRMAN suggested that we had not yet discussed the rôle of third parties in helping to create a political climate to pressure parties to be willing to have a peacekeeping operation—to let it operate—and then to move on to a political settlement.

Mr. FABIAN thought that peacekeeping and peaceful settlement are really two separate issues. He did not believe in the efficacy of necessarily tying the two together.

Mr. JOHN R. WILLIAMS asked General Rikhye if he would amplify his ideas on self-defense and perhaps give us some specific recommendations.

General RIKHYE replied that there are important constitutional aspects to this question. He did not have a solution, but of paramount importance is the protection of the individual. Peacekeeping demands minimum use of force in any particular situation. Can this be escalated? What are the limits? These have not yet been defined. From his experience his only conclusion was that minimum force should be used and the risks had to be accepted. In other words you had to accept loss of life.

The CHAIRMAN asked General Rikhye to comment on the Congo situation, where the rules laid down by the Security Council were changed to give greater latitude to the peacekeeping operation. What was the effect of the change in mandate?

General RIKHYE replied that there was greater elasticity as a result of the Security Council change. As an example he cited a situation in Katanga where U.N. forces had been locked into their own barracks. They were not able to come out without opposing the Katanga forces. As a result the U.N. force was immobilized and neutralized. After the Security Council change of mandate there was greater freedom of movement. The lesson they learned from this experience was that by placing U.N. forces in a provocative position they then had the right of self-defense.

Ambassador POPPER replied that in Cyprus the rules had been spelled out very carefully. But he thought it was desirable to keep the terms of reference of a U.N. peacekeeping force fairly general and flexible. This gives commanders in the field greater latitude, and is the best *modus operandi*.

General RIKHYE added his agreement that greater latitude is desirable and suggested that this increases the importance of a political representative in the field for direction.

Mr. ARNOLD FRALEIGH referred back to the discussion on peacekeeping



and peaceful settlement. He suggested that greater attention should be paid to the cease-fire resolution because at the time of its adoption the United Nations makes an important determination either (1) to freeze the existing battle lines; or (2) in an international conflict to call upon one of the belligerents to withdraw to its own borders; or (3) in an internal conflict to require the disbanding of one or both of the belligerents to preserve the unity of the country. The determination the United Nations makes at the time of the cease-fire has an important influence on the ultimate political settlement. The effort should be made to see that cease-fire resolutions contain conditions conducive to the realization of the desirable political settlement—not, as has happened often in the past, conducive only to a continuing partition of a country.

Ambassador POPPER replied that this would be gratifying if it were so, but that cease-fires are always arranged under extreme conditions. He cited for example the time it took to get support for Security Council Resolution 242 on the Middle East. Imposing conditions for a cease-fire might be desirable, in terms of longer-range peaceful settlement, but it was not realistic.

Mr. FRALEIGH pointed out that in 1956 in the Middle East, Israel was made to withdraw as a condition of the cease-fire, and when we look at the present situation, this may have been a wise move.

Ambassador POPPER replied that this was true but that such things depended on circumstances.

Mr. FRANZ B. GROSS referred to the failure of implementation of the police force of the Big Five provided for by the Charter. He hoped that the middle and small-Power participation in peacekeeping operations would continue, and asked the panel to discuss next steps for strengthening their participation.

General RUKHYE thought this was not a great problem. If they become involved in a peacekeeping operation and then object to the way it is being managed, they can always withdraw their forces. What makes their participation difficult is their unwillingness to take a position when the great Powers are in dispute over the issue.

The CHAIRMAN referred to the work that is now going on in the Committee of 33 and suggested that some agreement on basic issues between the super-Powers may be emerging.

Mr. PETER HANSEN suggested that the panel discuss the interrelation between potential conflicts and potential United Nations involvement as an essential issue for the consideration of future planning. The initiation of past U.N. peacekeeping forces had been based on the consent of the host country and a political consensus in the respective main U.N. organ. He touched upon the international and regional political constellations—in Latin America, Africa, Asia and Europe—and concluded that these did not seem to give much scope for future peacekeeping ventures along the well-known pattern from the Middle East, Congo or Cyprus.

The CHAIRMAN added another element to Mr. Hansen's question by asking what is the possibility for U.N. action in Cambodia?

Mr. FABIAN replied that he thought the prospects for a United Nations response in Cambodia, assuming a Cambodian request, was limited to a prodding rôle. He doubted that the United Nations would actually send troops or observers into Cambodia. He felt the United Nations would not treat such a request as it treated the U. S. request on Viet-Nam, but that it would not be able to do very much more.

General RIKHYE, in reply to Mr. Hansen, pointed out that the Charter recognizes the rôle of regional organizations. He felt that the future rôle for the United Nations was an increased one, including establishing a peace-keeping presence.

Ambassador POPPER agreed. He mentioned the inscrutability of the future, particularly in Eastern Asia, and raised the issue whether there would always be non-U.N. Members. He thought that it was probable there would be a future rôle for the United Nations in the Middle East, and perhaps such a rôle would be possible even in East or West Europe or in Latin America. We must remember that what is unthinkable today may not be unthinkable ten to twenty years from now.

The CHAIRMAN expressed appreciation for the contributions of members of the panel and of those others who had participated in the discussion, and adjourned the meeting.

### The United Nations and Lawmaking

The session convened at 2:15 o'clock p.m. in the Jade Room of the Waldorf-Astoria Hotel, Professor Wolfgang Friedmann of Columbia University Law School presiding.

The CHAIRMAN introduced the topic of the panel. He noted that the development of international law by the United Nations could be divided into three broad categories. First, there is the official and acknowledged lawmaking rôle of the International Law Commission and the Sixth Committee. Second, there is the varied and fertile rôle of the political organs of the United Nations in the development of international law. And third, there is the rôle of the United Nations and the various specialized agencies in the development of international constitutional, and administrative law. He then introduced the three panelists, each of whom would speak to aspects of one of the three broad categories.

## THE RÔLE OF THE INTERNATIONAL LAW COMMISSION

*By Shabtai Rosenne \**

There is a certain risk for one who has been closely involved, since 1949, in no less than three different capacities, to try and assess the rôle of the

\* Ambassador, Deputy Permanent Representative of Israel to the United Nations; Member of the International Law Commission; Associate of the Institute of International Law.

International Law Commission in United Nations lawmaking as the Organization is approaching its semi-jubilee. The events are still too close to guarantee that right perspective which only some measure of historical distance can vouchsafe. Therefore my remarks must be made with all reservations, due both to the closeness of the subject to us in point of time and to my own subjectivity.

At the outset it must be stressed that the International Law Commission is not the only organ operative in the field of lawmaking in the United Nations context. The International Law Commission works in close tie with the Sixth Committee of the General Assembly. The Sixth Committee itself, which has a broad sphere of concern even if at times its formal agenda may seem light, has set up a variety of subsidiary organs, some permanent and continuing, such as the International Law Commission or UNCITRAL, some not permanent but of indeterminate duration, such as the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States. There is continuous interaction between all these organs themselves, whether directly or indirectly through the co-ordinating and supervisory rôle played by the Sixth Committee. Furthermore, strong personal ties exist, with individual jurists wearing several hats, and their significance must not be diminished. Several members of the International Law Commission appear regularly as representatives of their countries in the Sixth Committee and in the diplomatic conferences which are called to put into final conventional form the draft articles prepared by the International Law Commission. Some members of UNCITRAL, which, unlike the International Law Commission, is not an independent body of experts but a subsidiary organ composed of representatives of states, likewise participate in the work of the Sixth Committee and of the other special committees, and so on. It is really a matter of systematic presentation in this discussion, rather than the particular merits of one or other organ and lawmaking method and machinery, that dictates the parcelling of the subject as the program of this Panel has it.

The fundamental question to be asked is whether the International Law Commission in its organizational context is responsive to the known or assumed needs of the international community.<sup>1</sup> This does not mean speculating whether it is necessarily the most efficient or professionally the most competent of the conceivable organizational patterns to discharge the functions imposed upon it. Responsiveness to the constantly changing needs of an expanding international community itself going through a deep revolutionary process cannot be equated with technical and professional competence. Therefore, to get to the roots of this question we have to go to another one and ask: Can it be established with any degree of precision what are the real needs of the international community in the somewhat imprecise area of the codification and progressive development of international law? Can these requirements really be pinpointed?

As is so often the case, the answer is both yes and no. The mere facts

<sup>1</sup> See, above all, Briggs, *The International Law Commission* (1965).

that, whatever its prehistory, Article 13 of the United Nations Charter does contain specific references to the codification and progressive development of international law; that it does impose specific duties on the General Assembly; and that almost immediately the General Assembly set its mind to the implementation of that provision and established the International Law Commission in 1947, are indications that in the initial, formative period of the United Nations those who took the lead recognized that the codification and progressive development of international law met a certain political purpose which itself was encased within the general purposes and objectives of the United Nations itself. The decisions taken at San Francisco, the forward reach of which continued through the work of the Committee of Seventeen of 1947 and the establishment of the International Law Commission and are felt even today, meant above all that the founders of the United Nations shared a common conclusion that, as part of its routine activities, the new international organization was to be obliged to encourage the progressive development and the codification of the law. The only substantial interpretation which can be placed on this is that the General Assembly was to take in hand the complete refashioning of the classic notions of customary international law with the general objective of making the law more effective as an instrument for assisting in the maintenance of international peace than it had shown itself to be in the past.

In one sense, this is a consummation of ideals and ideas which have a long history, going back at least to the French and American Revolutions, and which have inspired such milestones in the development of the law and legal machineries as the establishment of the Permanent Court of Arbitration or the International Court, and the work of learned societies such as the Institute of International Law. On the other hand, there can be seen in these decisions of 1945-1948 quite a sharp reaction on the part of the practical politician to too academic an approach to this topic which, in the view of some, characterized the work of the League of Nations in the same field. Thanks to the very skillful work of the United Nations Secretariat, and to the drive of your own Professor Jessup and of Professor Vladimir Koretsky of the Soviet Union, it is as though a giant crane had come and bodily lifted the whole codification effort off the track which led it to the apparent disaster of 1930 and placed it on another track which has led it to the apparent successes of Geneva and Vienna between 1958 and 1969.

The needs of the international community have of course changed over the period. Following the march of decolonization it has become a question of much more than simply refashioning the classic notions of customary international law and bringing them into tune with the realities of today. There is now a very real and urgent necessity—a political necessity—to create for all the newly independent countries in all corners of the globe a sense of confidence in the law and an appreciation that it is not, or does not have to be, an instrument of colonialism and of extortion but is rather the embodiment of the sinews of the very concept of the

sovereign equality of states. This means in practical terms not only that the General Assembly as a collectivity and the different member governments individually should have a defined place in the regular rhythm of the evolution of a codification project, but also that the organ primarily responsible for the groundwork, the International Law Commission, should itself be broadly representative of the different trends, and conduct its affairs in such a way that would elicit maximum response from the governments.

That being so, we have to ponder whether the effort which has been put into the codification movement by the members of the International Law Commission, by the responsible officers of the United Nations Secretariat and by the governments, as well as in academic study of this work—in which the American Society of International Law has played an extremely useful and fructifying rôle—is commensurate with the results achieved. That effort is a considerable and widespread one, which a cursory reading of the records of the International Law Commission and the Sixth Committee may not always bring out. Probably the most significant of the consequences of the manner in which the codification and progressive development of international law was included in the primary rôle of the General Assembly was that, in the words of the late Gilberto Amado,<sup>2</sup> the legal experts in whom the preparatory work was anchored were not to retreat into an “ivory tower,” but were to remain fully involved in and related to what was happening in the international community. It is perhaps this fundamental concept rather than administrative and budgetary considerations which has prevented the conversion of the International Law Commission into a full-time body, and which seems to have encouraged the type of professional representation which has been found in the Commission almost since its initiation—academic lawyers working harmoniously alongside professional diplomats with some general legal training and much practical experience, a goodly number of experienced legal advisers of Ministries for Foreign Affairs, and some experienced general lawyers, including national judges. This has provided the Commission with sufficient expertise on the specific topics of international law which it was considering at a given moment, an adequate leavening of impractical legal philosophizing, and a similar adequate leavening of the chronic impatience of the shrewd practical lawyer and diplomat at scholasticism, pedantry and mere academic brilliance.

Parallel to this refusal to exile the experts to any ivory tower of scientific abstraction, the founders deliberately set about to intensify the degree of consultation by the Commission with the governments through all stages of the progress of work on a given topic. What is more, where the formal

<sup>2</sup> In the meetings of the Committee on the Progressive Development of International Law and its Codification (the Committee of Seventeen), U.N. Doc. A/AC.10/SR.4, p. 3. For an assessment of Amado's rôle in the codification of international law, see the tributes paid to his memory in the Sixth Committee in 1969, U.N. Doc. A/C.6/L.791, March 25, 1970 (mimeographed only), and at the 1046th meeting of the International Law Commission, May 11, 1970.

provisions of the Statute are incomplete or open-ended, practice, and above all the insistence of the General Assembly on constantly supervising all the work of its own subsidiary organs, has come to fill the gaps. An interesting example is the question of the annual report by the Commission, and the annual debate on it which takes place in the Sixth Committee. There is not a word about this in the constituent documents. The International Law Commission is under no formal obligation to report each year to the General Assembly. Yet almost from the very beginning it was taken for granted that it would do so. The result has been a continuous interchange of views between the Commission and the General Assembly, now formalized by the referral of the Sixth Committee debates to the Commission, to be taken into account by it. Governments are given repeated opportunities to furnish formal written comments, statements, elements of fact and of practice and criticism of the Commission's work, and the Commission is obliged, under its constitution, to take all these into consideration in preparing its final texts. Indeed, it is quite fascinating to compare the modern observations by the governments, very practical, with those which were submitted to the League of Nations organs—far more theoretical and perfectionist! The annual debate, which has now settled into a pattern which can best be described as a grand inquisition into the general state of the progress of the codification of international law, and which deals as much with what is being done as it deals with what is not being done, provides a useful opportunity for a more formal interchange of views, not only between the Sixth Committee and the International Law Commission (which is customarily represented by its Chairman, not counting the fact that several of its members also represent their countries in the Sixth Committee), but between the members of the Sixth Committee themselves. As an illustration it may be mentioned that, what is perhaps not widely recognized, the fact that normal proceedings did not take place in the abortive nineteenth session of the General Assembly in 1964 greatly interfered with the Commission's progress, and nearly prevented the timely completion of the Commission's work on the law of treaties, if only because it left the Commission with little time to digest what the Sixth Committee wanted to say when it resumed normal work in 1965.<sup>3</sup> This incident also shows how dependent the codification effort is on the general political atmosphere prevailing in the organization.

It is frequently asserted that one of the reasons for the apparent failure of the League of Nations Codification Conference of 1930 was the remoteness of the preparatory work from the realities of the international situation, on the one hand, and the inadequateness of the diplomatic preparation for the diplomatic conference, on the other. The United Nations has shown itself alert to these criticisms and has made very de-

<sup>3</sup> Cf. the statement of the Chairman of the International Law Commission at its 17th Session, Milan Bartoš, at the 839th meeting of the Sixth Committee on Sept. 29, 1965. U.N. General Assembly, 20th Sess., Official Records, Sixth Committee at 6 (1965).

liberate efforts to meet them, at least within the framework of its own institutional patterns. These institutional patterns are not those of the traditional diplomacy working discreetly through the chancelleries and protected from the prying eyes of the inquisitive public. Rather are they those of the modern diplomacy-by-conference or parliamentary diplomacy which, as the International Court of Justice once said, "has come to be recognized in the past four or five decades as one of the established modes of international negotiation."<sup>4</sup>

This marriage of governmental reaction and professional expert investigation by the International Law Commission, and the development of the techniques of modern conference diplomacy for elucidating and resolving the political problems inherent in international lawmaking, have been progressively refined in the course of the twenty years of intensive codification activity under the auspices of the International Law Commission and the General Assembly. They probably reached their peak in the diplomatic phase of the codification of the law of treaties. The opening of the Vienna Conference in March, 1968, had been preceded by no less than five far-ranging debates in successive sessions of the General Assembly since 1962. These debates had spotlighted not only the political support for or opposition to the Commission's formulations of the substantive rules of international treaty law, but also the more general non-legal problems which were being engendered by the very idea of convening a diplomatic conference of plenipotentiaries to codify the law of treaties. Furthermore, the International Law Commission itself had, in connection with this topic, for the first time, been made privy to the organizational aspects of such a diplomatic conference,<sup>5</sup> so that when it came to make its recommendation for the convening of the conference, it had some idea of the practical problems which such a recommendation would create. This is an important evolution. There is little doubt that, for instance, many people were taken aback by the enormity of the problems, political, administrative, diplomatic and logistic, which were set before the inexperienced diplomatic services by the Geneva Conference on the Law of the Sea of 1958, commonly regarded, with justification indeed, as the point of departure of the intensified codification effort which the world has witnessed since then. Experience has shown that the practical, and at times mundane and humdrum problems of personnel organization, are of no less significance for the success of the codification effort

<sup>4</sup> South West Africa cases (Ethiopia v. South Africa; Liberia v. South Africa), Preliminary Objections, Judgment of Dec. 21, 1962; [1962] I.C.J. Rep. 319 at 346.

As an illustration, note that the Hague Conference of 1930 in principle met in private—something that would be unthinkable today. Acts of the Conference for the Codification of International Law (Official No. C.351.M.145.1930.V), Vol. I, p. 20; Vol. 2, p. 15; Vol. 4, p. 17. Rule XI of the Rules of Procedure provided that the minutes of meetings of committees should not be published until after the close of the Conference which itself had the power to defer publication of certain minutes as an exceptional measure. In the United Nations Codification Conferences, normally only the Drafting Committees and *ad hoc* working groups meet in private.

<sup>5</sup> See the discussions at the 879th and 880th meetings of the International Law Commission in 1966. [1966] I.L.C. Yearbook (I) 240.

than the substantive preparation for the diplomatic stage, which is the especial responsibility of the International Law Commission.

It is probably fair to say that, in the evolution of codification processes since 1949, the International Law Commission has performed the lead rôle.

The Commission has laid down the only long-term program that exists on the official intergovernmental level for the codification and progressive development of the law, and has been conscientiously working towards the fulfillment of that program. In its first session in 1949 the Commission surveyed the whole field of international law with a view to picking out the topics which it thought were appropriate for codification. It picked out fourteen topics, and from that list it alighted upon a further three for priority treatment. It is interesting to remind ourselves of those fourteen points and compare the expectations with the achievements. They included the following: (1) Recognition of States and Governments; (2) Succession of States and Governments; (3) Jurisdictional Immunities of States and Their Property; (4) Jurisdiction with Regard to Crimes Committed Outside National Territory; (5) Regime of the High Seas; (6) Regime of Territorial Waters; (7) Nationality, including Statelessness; (8) Treatment of Aliens; (9) Right of Asylum; (10) Law of Treaties; (11) Diplomatic Intercourse and Immunities; (12) Consular Intercourse and Immunities; (13) State Responsibility; and (14) Arbitral Procedure.<sup>6</sup> Of these topics, state succession and state responsibility are today under active consideration by the Commission. Five topics have not yet been examined at all. They are recognition of states and governments, jurisdictional immunities of states and their property, jurisdiction with regard to crimes committed outside national territory, treatment of aliens and the right of asylum. Probably some of these are not suitable for codification and should be dropped from the long-term program. It is also interesting to recall the topics discarded by the Commission in 1949. These were: (1) Subjects of International Law; (2) Sources of International Law; (3) Obligations of International Law in Relation to the Law of States; (4) Fundamental Rights and Duties of States; (5) Domestic Jurisdiction; (6) Recognition of Acts of Foreign States; (7) Obligations of Territorial Jurisdiction; (8) Territorial Domain of States; (9) Pacific Settlement of International Disputes; (10) Extradition; and (11) Laws of War.<sup>7</sup> The Commission was probably right in putting aside topics such as these which are excessively generalized and to some extent philosophical rather than concrete. On the other hand, some of these discarded topics may well be caught up in the broad sweep, if not of the codification effort in the narrower sense, then at least of the wider law-making activities of the United Nations; and the same can be said of the five topics left over from the 1949 list and which have not yet been

<sup>6</sup> I.L.C. Report, General Assembly, 4th Sess., Official Records, Supp. 10, U.N. Doc. A/925 (1949), at 3. Topics numbered 5, 6, 7, 10, 11, 12 and 14 have been completed in the Commission.

<sup>7</sup> Review of the Commission's Programme of Work and of Topics recommended or suggested for Inclusion in the Programme, to be published in [1970] I.L.C. Yearbook (II), U.N. Doc. A/CN.4/230.



touched. Nevertheless, already in 1968 the Commission recognized that it should give attention to its long-term program of work and aim at drawing up a new list of topics that are ripe for codification, taking into account General Assembly recommendations and the international community's current needs, and discarding those topics on the 1949 list which are no longer suitable for treatment.<sup>8</sup> It reconfirmed this decision in 1969,<sup>9</sup> after the General Assembly had considered it, and last November the General Assembly noted this intention of the Commission "with approval."<sup>10</sup> Obviously, this examination must be carefully done. A basis has been provided in a new preparatory document submitted by the Secretariat, and it is hoped that by the end of the 1971 session a new long-term program will have been drawn up to carry the general codification and progressive development of international law through to the jubilee year of the United Nations.

The work actually achieved by the Commission is more extensive than the work program laid down in 1949.

In the first place, in the early years the General Assembly imposed upon the Commission a number of general assignments which today would probably not be regarded as coming within the scope of the normal activities of the Commission as these are now crystallized. These include work on the draft declaration on the rights and duties of states, on the formulation of the Nuremberg principles, on the question of international criminal jurisdiction, on the defining of aggression and on the draft code of offenses against the peace and security of mankind. These assignments seem to have caused some perplexity both to the Commission and later to the General Assembly, and afterwards, whenever the General Assembly wanted further work done on any of these topics, it set up special bodies to do it.

A second general topic dealt with by the Commission in 1950 arose from Article 24 of the Commission's Statute and concerned ways and means for making the evidence of customary international law more readily available. The Commission's recommendations on this topic have been very fruitful. Among the major United Nations legal publications which have emerged from it are the *Reports on International Arbitral Awards*, the *United Nations Juridical Yearbook*, the *United Nations Legislative Series* and other pieces of documentation, including the Commission's own *Yearbook*, about the desirability of which I personally entertain some hesitation. This activity has also stimulated the compilation of national digests of state practice, which are becoming a noteworthy feature of the contemporary literature of international law.

Thirdly, experience has shown that progress on substantive topics is very likely to give rise to new topics for initial study by the Commission.

<sup>8</sup> I.L.C. Report, U.N. General Assembly, 23rd Sess., Official Records, Supp. 9, U.N. Doc. A/7209/Rev.1, at 32.

<sup>9</sup> I.L.C. Report, U.N. General Assembly, 24th Sess., Official Records, Supp. 10, U.N. Doc. A/7610/Rev. 1, at 32. The document cited in note 7 above was prepared in response to that decision.

<sup>10</sup> U.N. General Assembly Res. 2501 (XXIV), Nov. 12, 1969.

For example, out of the discussion on diplomatic privileges and immunities in the Conference of 1961, two other completely new projects have emerged, namely, that on Special Missions which was completed in the General Assembly last year, and that on representatives of states to international organizations, where the Commission hopes to complete its first draft this summer. It is doubtful if more than a few who participated in the Vienna Conference of 1961 and at the meetings of General Assembly at which the decisions were taken to complete diplomatic law by having these two topics examined by the Commission, had or could have had any notion that they would prove to be so difficult and require such prolonged and tedious examination by the Commission and afterwards at the diplomatic level. The Vienna Conference on the Law of Treaties has produced a significant request for an examination by the Commission of the question of the treaties of international organizations. I suspect that this topic, too, will prove to be much more difficult than might be assumed from the facility with which doctoral theses are written on it. Moreover, from the same origins the Commission on its own initiative has plunged into a study, which promises to be one of depth, of the most-favored-nation clause. The Commission's examination of the law of the sea led the Geneva Conference of 1958 to refer another topic back to the Commission, namely, the question of historic bays and waters. Certainly, there were elements of political compromise in that recommendation of the Geneva Conference, which so far has done little more than produce quite a fascinating study by the Secretariat, which was submitted to the Commission in 1962, but no action by the Commission. If the topic of responsibility of states, which the Commission is now discussing, should be strictly limited to the international responsibility of states to states, it would be a reasonable assumption that the Commission will subsequently be asked to examine the two related topics of the mutual responsibility of states and international organizations, and of two or more international organizations between themselves.

It might be asked why the Commission leaves these openings. The answer is that they do not become very obvious until work on the basic topic in its classical form is completed. The law of treaties, for example, is vast and unmanageable even in its historic framework of treaties between states. I was one of those who in 1965 regarded the manner in which the Commission expressed its final decision to limit its codification of treaties between states as a somewhat retrogressive step. On the other hand, there is no ready answer to those who have said that the question of treaties of international organizations requires further study—much study—before it can be presented to states in an acceptable form. The more one looks at the Vienna Convention on the Law of Treaties, the more difficult it will be found to apply its provisions automatically to treaties of organizations. The same is true of the other branches of the law. It was not an easy task to take the Vienna Convention of 1961 on Diplomatic Relations and adapt it to the peculiar requirements of what are now known as Special Missions—how much better than “itinerant envoys,” as they

were once called—or to Permanent Missions to international organizations. It is a very painstaking and unrewarding exercise but it has to be done.

Taking a hard look at the programs of the International Law Commission, the fact remains that with all that has been done, that part of the United Nations lawmaking activities which is centered around the International Law Commission is now concentrated on the hard core of traditional international law. The law of the sea was a tough proposition involving major clashes of political and military interests and in that sense the Geneva Conference of 1958 has its historical parallel in the Hague Conferences of 1899 and 1907, and even more so in the London Conference of 1908. The codification of diplomatic and consular law lacks any element of high drama, but nevertheless has proved its value in practice by facilitating in a troublesome area the transaction of international business. Both these topics are somewhat peripheral. With the law of treaties the codification effort is entering the core of the law; and of course the law of state responsibility, if the Commission continues along the lines laid down by its Subcommittee in 1963,<sup>11</sup> and now on the basis set by Professor Ago last year,<sup>12</sup> will complete this hard core of obligatory law, and thus provide the trunk from which all the other branches of the law will draw their strength.

In the course of its experience the Commission has gone a long way in refining its procedures. At first it operated quite literally on the basis of the formal rules of procedure of the General Assembly,<sup>13</sup> and was prone to decide controversial issues by vote. But this is an abrupt way of deciding issues, and all experience shows that it is an unsatisfactory procedure for international lawmaking, especially when it is remembered that the majorities were frequently small, transient and even fortuitous. It was on this basis that the Commission's first major codification project, the draft articles on the law of the sea, was put together, and the fact that those draft articles were composed in that way probably offers the principal explanation both for the difficulties which were encountered at the Geneva Conference of 1958, and for the fact that this codification effort is now being seen in retrospect to have been less satisfactory and realistic than was thought at the time, and indeed may even be breaking down on certain cardinal issues. Since then the Commission has thoroughly revamped its procedures and for this it has received the formal endorsement of the General Assembly. In 1958 it decided that in future its Drafting Committee should be formally constituted as what it had long been in fact, namely, a committee to which could be referred not merely pure drafting points, but also points of substance which the full Commission had not been able to resolve, or which seemed likely to give rise to unduly protracted discussion.<sup>14</sup> It is thus to a great extent a negotiating

<sup>11</sup> [1963] I.L.C. Yearbook (II) 227, U.N. Doc. A/CN.4/152 (1963).

<sup>12</sup> To be published in [1969] I.L.C. Yearbook (II), U.N. Doc. A/CN.4/217 (1969).

<sup>13</sup> *Loc. cit.* in note 6, at 1.

<sup>14</sup> I.L.C. Report, U.N. General Assembly, 13th Sess., Official Records, Supp. 9, U.N. Doc. A/3859, at 30. And see General Assembly Res. 1290 (XIII), Dec. 5, 1958.

or conciliating group, to which all points of view are referred and which, working informally, attempts to produce texts which, after further discussion and, if need be, amendment, will be adopted by the full Commission by what United Nations jargon now calls "quasi-unanimity." This system was initiated for the draft articles on consular relations. It reached the peak of its development in the production of the draft articles on the law of treaties. Indeed the view has been expressed that without the work of the Drafting Committee as it had developed in practice, there would be no Vienna Convention on the Law of Treaties, and the practice was reconfirmed in 1968.<sup>15</sup> In the codification of the law of treaties an attempt was made, with some success, to transfer this basic pattern of work into the procedure of the diplomatic conference. Examination of the Commission's prolonged work on the law of treaties will disclose that, with one or two exceptions, the formal vote at both the first and the second readings took place only at the very end of the discussions; that when the Commission was very evenly divided, no text was put forward at all; and that in one or two cases where the Commission was divided on a sort of 60:40 basis, the necessary two-thirds majority was not available in the diplomatic conference and the controversial passage was dropped there. This manner of proceeding, which incidentally is characteristic of the Sixth Committee in general and has been for a long time, may well produce less incisive texts than can be done by straight majority voting. However, the end-product is probably more satisfactory to the diplomatic temperament because it attracts the widest possible degree of support both in the Commission itself and afterwards in the diplomatic conference. No part of the Vienna Convention of 1969 was adopted by a bare two-thirds majority, but always by one well in excess of two thirds. Furthermore, there were no bitter procedural discussions such as marred previous codification conferences.

Viewing the achievements and the aspirations of this aspect of the United Nations lawmaking effort, one must be struck by the curious mixture of politically controversial and politically non-controversial topics which have been dealt with. The diplomatic law is non-controversial and raises no high feelings, although it is interesting to recall that the General Assembly's resolution of 1952 requesting the Commission to take up the subject as a priority topic was itself a compromise solution of a concrete international difficulty.<sup>16</sup> It was otherwise with the law of the sea (although the amount of political controversy which it created may be due partly to the fact that possibly the Commission failed to appreciate the political forces which were at work and which indeed found some expression in the General Assembly before 1956, but which were only fully released in the diplomatic conference). With the law of treaties things begin to look different. There is much political controversy around nearly every article of the Vienna Convention. Sometimes it is a matter

<sup>15</sup> See discussion at 972nd meeting of the Commission on July 10, 1968. [1968] I.L.C. Yearbook (I) 169.

<sup>16</sup> General Assembly Res. 685 (VII), Dec. 5, 1952.

of domestic politics where it produces considerable emotional strains, as can be seen, for example, in this country itself. However, because of the high technicality of the subject and because of the overriding influence of the self-discipline which the law imposes on its practitioners, the degree of controversy is frequently presented in subdued tones and only very exceptionally does it reach the highest levels in the political hierarchy. The outcome of the codification of the law of treaties shows that, with the relaxed procedures which now exist and within the organizational framework provided by the General Assembly with its annual investigation of what is going on, codification of these politically controversial topics can be approached with some measure of restrained confidence. The examinations, now under way, of state responsibility which, to judge by the Commission's preliminary discussions in 1962-1963, will probably be even more delicate in a political sense than the law of treaties, and of the rather special and pressing problems of state succession, are the direct consequences of the fact that the codification of the law of treaties was successfully concluded.

Now what is the special ingredient that makes this particular law-making effort apparently responsive to international needs and which has enabled it, after a shaky start, to make considerable headway, even if much remains to be done and if there is sometimes impatience at the irregular rhythm of the flow of texts from the Commission—not in itself a serious matter? Here reference is appropriate to one of the fundamental controversies concerning the nature and the binding force of customary unwritten international law. This is a well-known and long-standing controversy over the extent, if any, to which a new state, by virtue merely of its coming into existence, is bound by all the rules of customary international law which existed on the day of its independence, in the formation of which it had no say and could not possibly have had any say. This question is much debated in the literature. It first came to the fore as a political matter in the mid-19th century, as the Latin American states gained their independence. The question has become acute in the present century. It was felt in Europe and in Asia as the new states started coming into existence in the wake of World War I, and is pressing today, when more than half the Members of the United Nations came into existence after World War II. In these terms, the issue is not theoretical or philosophical but one of an intensely practical character, because it is bound in with all the issues of decolonization, of what for the sake of brevity may be called the peaceful co-existence between different systems of state organization, and the like. It has become a question which, if allowed to linger untouched by careful and guiding hands, might place the whole of the law in jeopardy and in itself engender deep and far-reaching international tensions. This is not a question merely of uncertainty in the law, frequently held up to justify the codification effort, but of its very existence as a cohesive element in the divided world of today.

Codification is now organized in a way that is designed to combine two functions which the international community feels are necessary to enable

it to cope with this situation. The first is independent expert preparation in a form which does not commit governments prematurely. This aims at introducing a greater measure of certainty into written law than could exist so long as the basic rules remained in an unwritten form—and "written law" has now come to mean "written by states." The second is a diplomatic phase in which in principle every state which is a member of the international community may participate if it wishes and have its say. The psychological implications of participation in the diplomatic codification conferences cannot be overestimated, for that is really how the unwritten law comes to be written. The evolution of the international community can be easily traced by the participation in the codification conferences, and the rôles played by the different geographical areas. The 1893-1907 complex marked the entry of the Latin American states into the main stream of international law creativity. The 1930 Conference was moribund from this point of view because of the sterility and imbalance of the League of Nations. The 1958 and 1960 sea law codification conferences symbolize the appearance of the Socialist law of Eastern Europe, and of emancipated Asia, and the reappearance of the ex-enemy Powers of World War II in the main stream of international law creativity and the beginning of the apprenticeship of the African states. The conference on the law of treaties epitomizes the full-blown, Athena-like, appearance of Africa without whose insistence, along with the personal skill of the African Chairman of the Committee of the Whole, the Vienna Convention would probably never have been completed.

It is also in this psychological factor that can be found one explanation for the tremendous number of amendments which are put forward in the codification conferences. Some of the articles on the law of the sea were quite fundamentally amended at the Geneva Conference, another indication that perhaps the preparatory phase was not fully satisfactory. But of the several hundred amendments put forward in the last Vienna Conference it is doubtful if more than half a dozen of them would have led to any fundamental changes in the International Law Commission draft had they been adopted, while most of those that were accepted may well be regarded as improvements, especially when they corrected some excess of enthusiasm or of caution which from time to time, despite the safeguards, crept into the draft articles.

Finally, it may legitimately be asked, to what extent is the progress of the codification effort coming into the main stream of international political activity? Is the codification of the law influencing at all the behavior of statesmen and diplomats? Is it having any impact on the development of national policy? It is still premature and difficult to offer any firm conclusions, because it is far too early for any relevant material to have found its way into public archives and other sources of diplomatic history. Yet it is known that some aspects of the codification effort have required consideration at the highest political level. The Geneva Conferences of 1958 and 1960, for instance, were attended by statesmen and diplomats, including many cabinet ministers, of high rank, and it is known

that on some aspects diplomatic representations had to be made at the very highest level, for the law of the sea touches upon the vital interests of nearly every state in the world. The treatment of the law of the sea then is responsible for putting the codification effort as a whole on the political map. Very strenuous diplomatic efforts accompanied the Vienna Conference on the Law of Treaties, and one reason for dividing the Conference into two sessions was to allow for time to clarify the issues on which the diplomatic machinery would have to work. It has not gone unnoticed that more than one Head of State or Minister for Foreign Affairs, when addressing the General Assembly of the United Nations, has found it appropriate to refer explicitly to the International Law Commission and to the progress of the codification effort. There is little doubt that the codification conventions have smoothed international relations in the areas with which they deal, and have been useful in reducing or in keeping under some measure of control some international tensions, although it is hard to be more specific at the present juncture. Now that the Commission, having completed its main work on the law of treaties, has turned its attention to the other aspects of international obligation-law, the law of state responsibility, around which many serious political controversies revolve, it can be anticipated that more and more the codification work is going to be integrated into international politics. In that can be found assurance and comfort that international law, modernized and stripped of many of its undesirable features, will attain its proper place in the conduct of international affairs, although that may not be the place assigned to it by some of the more idealistic exponents of the natural law theories.

## THE UNITED NATIONS AND LAWMAKING: THE POLITICAL ORGANS

*By Rosalyn Higgins \**

In the early 1960's, when I first became interested in this subject, the proposition that the political organs of the United Nations were engaged in lawmaking was regarded as novel. The view that political bodies developed law was variously described as pioneering or unorthodox, according to the viewpoint of the commentator. In the decade that has since elapsed, there have been many significant contributions to the literature which examine the extent, scope and limitations of this lawmaking activity.<sup>1</sup> The greater change, perhaps, has been the gradual acknowledg-

\* Of the Royal Institute of International Affairs, London.

<sup>1</sup> See, for example, Obed Y. Asamoah, *The Legal Significance of the Declarations of the General Assembly of the United Nations* (Nijhoff, 1966); Hungdah Chiu, *The Capacity of International Organizations to Conclude Treaties and the Special Legal Aspects of Treaties So Concluded* (Nijhoff, 1966); Ingrid Detter, *Law Making by International Organizations* (Stockholm: Norstedt, 1965); Lino DiQual, *Les Effets des Résolutions des Nations-Unies* (Paris: Pichon et Durand-Auzias, 1967); Bernard Ronyer-Hamery, *Les Compétences Implicites des Organisations Internationales* (Paris: Pichon

ment that, on the one hand, the basis of law is not solely contractual; and, on the other, that there is more at issue than a question of the formal legislative competence of the organs under discussion.

The view that an international lawyer holds on any substantive issue is to a large extent preconditioned by the view he holds on certain underlying jurisprudential matters; and the question of lawmaking by political organs of the United Nations is no exception. Any discussion of this necessarily involves clarifying one's views on such matters as the basis of legal obligation and the method by which customary law is generated.

To make clearer my own starting point I will here repeat briefly what I fear I have said on many other occasions<sup>2</sup>: that the political bodies of international organizations are a relevant forum in which to search for acknowledged sources of law, namely, treaties and customs; and further, that the United Nations provides a comparatively sharply focused forum for state practice by United Nations Members; and that United Nations organs, in their day-to-day work, necessarily contribute to the clarification and creation of law.

The proposition is that the General Assembly and Security Council provide a concentrated forum for the practice of states on a wide range of issues. This state practice comprises the total of their individual acts and of their collective acts. To this extent, therefore, the United Nations political organs provide *sources formelles*—the evidences of a recognized source of law in the form of state practice showing the existence of a custom.

The Security Council and General Assembly also contribute to the *sources matérielles* of international law. Not only are they organs in which states may make pronouncements and vote, thus revealing state practice, but they are bodies which are themselves engaged in acts *qua* organs. They have tasks to perform which contribute to the clarification and development of law.

In both cases—the practice of states *qua* states, and the practice of states *qua* organs—constant repetition of practice, together with the presence of *opinio juris*, can lead to the development of customary law. So the politi-

---

et Durand-Auzias, 1962); Finn Seyersted, "Objective International Personality of Inter-Governmental Organizations. Do Their Capacities Really Depend upon the Conventions Establishing Them?" 34 *Nordisk Tidsskrift for Internationaal Ret og Jus Gentium*, Fasc. 1 (1964); Edward Yemin, *Legislative Powers in the United Nations and Specialized Agencies* (Sijthoff, 1969); Salo Engel, "Procedures for the De Facto Revision of the Charter," 1965 *Proceedings, American Society of International Law* 108-116; Richard Falk, "On the Quasi-Legislative Competence of the General Assembly," 60 *A.J.I.L.* 782-791 (1966); Gabriella Lande, "The Changing Effectiveness of General Assembly Resolutions," 1964 *Proceedings, American Society of International Law* 162-170; Oscar Schachter, "The Relation of Law, Politics and Action in the United Nations," 109 *Hague Academy Recueil des Cours* 169-256 (1963, III); Krzysztof Skubiszewski, "Forms of Participation of International Organizations in the Lawmaking Processes," 18 *Int. Organization* 790-805 (1964).

<sup>2</sup> *E.g.*, in *The Development of International Law through the Political Organs of the United Nations* (Oxford University Press, 1963); and "The Development of International Law by the Political Organs of the United Nations," 1965 *Proceedings, American Society of International Law* 116-124.



cal organs of the United Nations are engaged both in law development and in law clarification. I think that Judge Tanaka has described one aspect of this United Nations law-developing program very well in his opinion in the *South West Africa Cases*. He reminds us that the creation of custom has traditionally been individualistic, that is to say, by states acting individually. Through the rôle that international organizations have come to play,

A State, instead of pronouncing its view to a few States directly concerned, has the opportunity, through the medium of an organization, to declare its position to all members of the organization and to know immediately their reaction on the same matter. In former days, practice, repetition and *opinio juris sive necessitatis*, which are the ingredients of customary law might be combined together in a very long and slow process extending over centuries. In the contemporary age of highly developed techniques of communication and information, the formation of a custom through the medium of international organizations is greatly facilitated and accelerated; the establishment of such a custom would require no more than one generation or even far less than that. . . .<sup>3</sup>

In 1965, when last I was privileged to participate at the Annual Meeting of the Society, I endeavored to list the ways in which the organs themselves contributed to law development,<sup>4</sup> and, international lawyers being among the most notorious of stage armies, I would not risk repeating this in any detail. I will merely refer to decisions taken by United Nations organs concerning their own jurisdiction; decisions which are deliberately declaratory of existing law; resolutions confirming unclear areas of law; resolutions arrived at after detailed discussion of competing claims as to the law; resolutions calling for the adoption of new rules of law; and decisions which apply specific rules to particular situations. All of these, in various ways, contribute to the gradual development of international law and provide some probative evidence as to *opinio juris*.

### 1. *Opinio Juris*

But there are very real difficulties about the identification and scope of the lawmaking practices of U.N. political organs. The *opinio juris* problem is perhaps paramount. If a law-declaring resolution of the General Assembly is adopted by a very substantial majority, what guidance do we have as to whether they believed themselves legally bound so to do? They may, it is argued, have voted affirmatively purely out of political self-interest. Politically motivated state behavior is accepted as evidence in bilateral diplomacy, and there is no reason why it should not be in institutionalized evidence. It becomes relevant only insofar as it suggests that *opinio juris* is lacking. What is the position where a state votes for a law-declaring resolution because its allies are doing so, or because it does not want to be isolated in the sole company of certain political undesirables—yet it believes that the resolution in question does not represent law?

<sup>3</sup> *South West Africa Cases*, [1966] I.C.J. Rep. 231.

<sup>4</sup> *Loc. cit.*, note 2.

This was clearly the case in the United Kingdom's affirmative vote for General Assembly Resolution 1514(XV) on the Granting of Independence to Colonial Peoples, insofar as the clauses disallowing delay on grounds of economic or political unreadiness were concerned. What also about the similar situation where a state votes for a resolution, often for these same reasons, but issues a collateral statement indicating misgivings about the legal validity of the resolution?—for example, the United States position on General Assembly Resolution 2131(XX) on non-intervention, which it felt exceeded itself by effectively prohibiting normal diplomatic bargaining?

The only answer is to look to all the available evidence: a vote in such circumstances is not of a higher status than a collateral statement, or even of clearly but privately expressed, dismay. So far as the individual state is concerned—and here I speak of law-declaring resolutions—it may in these circumstances regard that its position is reserved. And the element of *opinio juris* required for that resolution to form part of a practice which will evidence custom, will have been weakened.

But we should not assume that such a resolution, in which the votes of some states were cast with mental reservations of various kinds, is without legal significance. Professor Falk, writing recently in the *American Journal of International Law*,<sup>5</sup> has perceptively pointed out that “the characterization of a norm as *formally binding* is not very significantly connected with its *functional operation* as law.” Not only are claims subsequently advanced which rely on non-binding declaratory resolutions, but, perhaps more importantly, expectations have been created as to the likely content of subsequent international decisions on the same subject. Notwithstanding a lack of clear *opinio juris* in respect of certain important nations who voted for General Assembly Resolution 1514(XV), it had a certain legal effect in terms of what was likely to follow at the United Nations.

A closely related problem has been that of deciding at what point in time rules enunciated in a resolution or treaty become sufficiently accepted by the world community so as to come to bind not only those who have accepted the instrument concerned, but also those who have not. The International Court of Justice has recently had occasion to deal with this question in the context of the provisions of Article 6 of the Geneva Convention of 1958 on the Continental Shelf, dealing with the equidistance principle. Among other arguments, The Netherlands and Denmark contended that this principle, even if not representing general international law at the time it was adopted, had since so become, and was thus binding on Germany, a non-party to the convention. Some fifteen cases were cited, occurring since the signature of the convention, in which continental shelf boundaries were, or were agreed to be, delimited according to the equidistance principle. The Court thought that these had little weight as precedents, first (a curious reason), because they were a very small proportion of those potentially calling for delimitation in the world as a

<sup>5</sup> Falk, “On the Quasi-Legislative Competence of the General Assembly,” 60 A.J.I.L. 782-781 (1966).

whole,<sup>6</sup> and second, because over half the states concerned were, or shortly became, parties to the Geneva Convention. They were therefore, said the Court,

presumably . . . acting actually or potentially in the application of the Convention. From their action no inference could legitimately be drawn as to the existence of a rule of customary international law in favour of the equidistance principle. . . .<sup>7</sup>

As regards the other states (those which were not or did not become parties to the convention), the basis of their action, asserted the Court "can only be problematical and must remain entirely speculative" (p. 44). There was "no shred of evidence" that they believed themselves to be applying customary international law.

I find this Judgment profoundly disappointing for a variety of reasons,<sup>8</sup> including this handling of the *opinio juris* question. Having told us that there was no "shred of evidence," the Court at no time indicated what evidence it would have regarded as telling in respect of revealing *opinio juris*; nor, apparently, was any attempt made scientifically to ascertain what were the motives of the states concerned. The Court was content to leave them in the category of "problematical." Although the Court's findings were in respect of subsequent practice regarding an international treaty, the parallel with U.N. lawmaking resolutions is clear.

2. *The size and nature of the majority voting for a resolution* is also a matter of major significance. We return here to the theory of legal obligation. The notion of contract was in time replaced by consent, express or implied. Wilfred Jenks, among others, has persuasively suggested that, so far as international organization is concerned, consent has effectively been replaced by consensus.<sup>9</sup>

But what is the composition and quality of that consensus? The International Court, when examining what subsequent practice would convert a special procedure into a rule of customary international law (here the content was the equidistance principle in the delimitation of the North Sea Continental Shelf), asserted that

State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision involved.<sup>10</sup>

This is a rigorous qualification. Insofar as United Nations resolutions are concerned, certain of them, such as those calling for an early termination

<sup>6</sup> North Sea Continental Shelf Cases, [1969] I.C.J. Rep. 3 at 43; 63 A.J.I.L. 591 (1969).

<sup>7</sup> *Ibid.*

<sup>8</sup> See Goldie, "Sedentary Fisheries and the North Sea Continental Shelf Cases," 63 A.J.I.L. 536 (1969), and Friedmann, "The North Sea Continental Shelf Cases—A Critique," 64 *ibid.* 229 (1970).

<sup>9</sup> See "Unanimity, The Veto, Weighted Voting, Special and Simple Majorities and Consensus as Modes of Decision in International Organizations," in Cambridge Essays in International Law (Stevens, 1965).

<sup>10</sup> North Sea Continental Shelf Cases, Judgment, [1969] I.C.J. Rep. 43.

of colonial situations, have the support of the vast majority of nations, though often the opposition of those whose "interests are specially affected," viz., Portugal and South Africa. I would have thought that cumulatively, even if individually they are not "binding" on these countries, they do create a community expectation about what is and is not lawful behavior. Where human rights are concerned it surely does not do to rely so totally on the behavior of the parties directly concerned. The interest of the vast majority is a real and legally relevant one.

Resolutions seeking formally to make law in new areas, and specifically in areas where the likely protagonists are very limited in number, present rather different problems. In such matters as prohibitions on atomic testing and co-operation in Outer Space the votes of the super-Powers are properly of paramount consideration, and they can be said to "weigh" more than those of the world community. Notions of efficacy and continuity would dictate that their active support is essential for the resolutions concerned to enter into the stream of lawmaking.

### 3. *Legislative Competence of the General Assembly and Security Council*

There are few reminders so constantly given about the United Nations than that the General Assembly has no legislative competence. It is pointed out that, with the exception of certain budgetary decisions under Article 17 of the Charter, the Assembly cannot pass binding decisions but can only recommend. While this, is, of course, quite true, the element of state consent should not be too much exaggerated. There occur a plethora of Assembly recommendations which are, for internal purposes of the Organization, decisions, and which entail legal consequences for Members. Often, in respect of these internal matters, the consent of the plenary is not specifically asked. Ingrid Detter, in her book on *Law Making by International Organizations*, has given many such examples. Other recommendations, for example those to establish subsidiary bodies, entail financial consequences which are legally incumbent upon all the Members, whether they voted for the recommendation or not. In other words—and I think this now commands a fairly wide support among international lawyers—the passing of "binding decisions" is not the only way in which law development occurs. Legal consequences also can flow from acts which are not, in the formal sense, "binding." And, further, law is developed by a variety of non-legislative acts which do not seek to secure, in any direct sense, "compliance" from Assembly members: I refer here to the "law-declaring" activities of the Assembly, and to these I shall return.

The lack of a legislative competence in the Assembly does not, of course, mean that the Assembly is incapable, through its practice, of contributing to the development of customary international law. The resolutions and declarations of international organs, repeated with sufficient frequency and bearing the characteristic of *opinio juris*, can establish a general practice recognized as legal custom. In this context, therefore, reiteration of the fact that the Assembly is not a legislature is irrelevant. One of the issues before the International Court in the *South West Africa Cases* on

the merits was whether United Nations practice has established a legal norm of non-discrimination. My purpose here is not to examine the correctness of that proposition—though I shall have some words to say about it later—but rather to observe that one cannot begin to answer this question merely by reiterating that the Assembly has no power to pass “binding” decisions. It was thus depressing to find Judge *Ad Hoc* van Wyk stating, in this context:

Applicants’ contention involved the novel proposition that the organs of the United Nations possessed some sort of legislative competence whereby they could bind a dissenting minority. It is clear from the provisions of the Charter that no such competence exists, and in my view it would be entirely wrong to import it under the guise of a novel and untenable interpretation of Article 38(1)(b) of the Statute of this Court.<sup>11</sup>

Carried to its logical conclusion, Judge van Wyk’s proposition entails the view that development of customary law necessitates—if arguments about the absence of legislative competence are to be met—the approval of *all* the members of the organ. Thus he faces, and says, in respect of the claim that a sovereign state may be bound against its will by customary law, “it follows that . . . acquiescence is a prerequisite to the creation of a new norm. . . .”<sup>12</sup> Approval of the *majority*, which may in certain circumstances be deduced from acquiescence, is indeed necessary; but not the approval or even acquiescence of every single state. The development of customary law is subject to no unanimity rule, though the consensus must be overwhelming.

While Judge van Wyk’s comments are disappointing, they are not unexpected; whereas those of Judge Jessup are to my mind more surprising. When faced with the claim that United Nations practice had evolved a norm of non-discrimination (and again, my intent is not necessarily to suggest that the claim was correct) Judge Jessup replied: “[The] contention [is] open to . . . attack: . . . since these international bodies lack a true legislative character, their resolutions alone cannot create law. . . .”<sup>13</sup> But it seems to me that the legislative character is not what is at issue. What is required is an examination of whether resolutions with similar content, repeated through time, voted for by overwhelming majorities, giving rise to a general *opinio juris*, have created the norm in question. So much criticism of the view that the organs of the United Nations develop law is in terms of a deprecation of “instant law.” But this is to misrepresent the much more reasonable claims which are made by those who point to the United Nations’ law-developing rôle. Before moving on from this question of legislative competence, it seems necessary to say a few words about law-development in the very limited regulatory area that does exist—Chapter VII of the Charter. Article 25 of the Charter makes it clear that *decisions* of the Security Council are binding on all Members of the United Nations, whether they voted for them or not, whether they

<sup>11</sup> South West Africa Cases, Judgment, Merits [1966] I.C.J. Rep. 170.

<sup>12</sup> *Ibid.*

<sup>13</sup> *Ibid.* 432.

are represented on the Security Council or not, whether they agree with them or not. Yet some persons have argued that not all acts which are binding are necessarily lawmaking. Both Skubizewski, writing in *International Organization*,<sup>14</sup> and Fitzmaurice in *Symbolae Verzijl*,<sup>15</sup> have insisted upon a distinction between decisions which are "law" and decisions which create "obligations." Quite obviously, the answer to this one depends upon one's concept of "law." My own view is that binding decisions create legal obligations and as such are "law-creating." All acts which create a community expectation of required legal consequence are necessarily a part of the law-creating process.

#### 4. *Development of International Law through Charter Interpretation*

Both the General Assembly and the Security Council are engaged in a constant process of Charter interpretation. This process cannot be simply defined as classical treaty interpretation. The Charter is an instrument which contains provisions relating to its internal affairs. It also contains clauses which concern general international law: Article 2(4) on the use of force, Article 51 on self-defense, and Article 2(7) are among the most obvious examples. This general international law often has to be invoked, applied, and in due course, developed, on the basis of treaty interpretation. We have here, therefore, a twilight area of customary and treaty law. Within the United Nations the traditionally distinct sources of treaty and custom become fused.

This interpreting function was, to a certain extent, foreseen at San Francisco. The Report of Committee IV/2 on the drafting Conference makes it clear that

in the course of the operations from day to day of the various organs of the Organization it is inevitable that each organ will interpret such parts of the Charter as are applicable to its particular functions.

There is a real dilemma here: on the one hand we have the initial right of an organ to interpret the Charter in order to carry out its functions; on the other hand we have the right of Members not to be bound by mere recommendations. Are United Nations Members bound by recommendations which are in fact authoritative interpretations of the Charter? Professor Tammes has suggested<sup>16</sup> that a state may always hold its individual view against the interpretation of the organ, provided that it has not recognized in advance the organ's power of effective interpretation. He offers as an additional ground for this view the argument that an organ as well as an individual state can become *judex in re sua*, especially when it is seeking to expand its activities. I find difficulties in accepting Professor Tammes's view, because it seems to run counter to the

<sup>14</sup> "Forms of Participation of International Organizations in the Lawmaking Processes," 18 *Int. Organization* 790-805 (1964).

<sup>15</sup> At p. 153.

<sup>16</sup> "Decisions of International Organs as a Source of International Law," 94 *Hague Academy, Recueil des Cours* 265-364 (1958, II).

"effectiveness" principle in the interpretation of international constitutions. I am also impressed by Fitzmaurice's observation<sup>17</sup> that the prime competence of an organ to interpret the Charter is in fact a *protection of sovereignty*, as it protects states from the attempts of other states to determine such matters unilaterally. My own view is that we must find the answer by looking at what it is that the organ is purporting to interpret. Insofar as an organ is interpreting the provisions of the Charter to establish its jurisdiction or internal functioning, it has a clear authority so to do, and individual states which dissent may not reserve their position. But where the organ is passing on matters concerning the substantive rights and duties of states, it has the initial authority to interpret the Charter but the state may, in the non-regulatory area (that is, outside of Chapter 7 and Article 19) reserve its position, but only after considering the recommendation in good faith.

Thus it seems to me that, in the face of an Assembly resolution which interprets Article 11(1) to mean that nuclear-free zones should be established in South America, states may reserve their positions. But where the question is whether the Security Council resolution on oil sanctions is invalid because two permanent members abstained, all are bound to take legal cognizance of the fact that for nineteen years the Security Council has interpreted Article 27(3) to mean abstention shall be counted as an affirmative vote rather than a veto.

I would like now to say just a few words about law-development by the Security Council in the regulatory area, that is to say, under Chapter VII, which gives it the authority to make binding decisions. Article 25 of the Charter makes it obligatory for Members to carry out the decisions of the Security Council. The Security Council does have, in this limited area, a very real law-developing power. (I have already suggested that it is unreal to say that some decisions may be "obligations" but are still not "law".) Although *opinio juris* is still an essential ingredient, it is likely to occur within a very much shorter span of time (perhaps after only one decision) simply because it has been shown that the Council can reach consensus on a particular matter, and there is a community expectation that Members are legally bound. For example, the Security Council, in its resolution of April, 1966, authorized the United Kingdom Government to use force if necessary to prevent the ship *Joanna V* from unloading oil for Rhodesia at the port of Beira. Now I do not wish to exaggerate the significance of this resolution; because of the many distinguishing features, the precedent which it sets is very limited. But I do want to suggest that it has created new legal expectations both as to who may be authorized to use limited force, and the circumstances (in this case going beyond traditional self-defense) in which such an authorization may be made. I think that *opinio juris* within these narrow confines is already present, and repeated practice is not necessary to confirm that the law has indeed here been developed.

This leads to a related question. Is the authority of the Security Coun-

<sup>17</sup> In 93 *ibid.* 5 (1957, II).

cil under Chapter VII non-reviewable? Can a Member of the United Nations decline to give effect to a decision under Chapter VII on the grounds that the obligation in Article 25 impliedly applies only to legally valid decisions of the Security Council, and that until such time as the Court has pronounced on the matter, the dissenting state may decline to comply? This is, of course, effectively the argument advanced by South Africa in respect of the Rhodesian resolutions. She has contended that the premise that there is a threat to the peace, from which the application of Chapter VII flows, is faulty. And suggestions were made that the Court be asked to give an opinion on this point. It seems to me that both the wording of the Charter and the *travaux préparatoires* indicate that in the area of peace and security the need for speed and compliance is paramount, and that all states come under an immediate legal obligation to comply with a decision under Chapter VII. In this sense, therefore, the activities of the Security Council may be "lawmaking." To say that the Court should not be asked to say whether the Security Council was correct in deeming the Rhodesian situation a "threat to the peace," because that would be a "political" question, is really a shorthand and somewhat loose way of saying that the Security Council has been given a non-reviewable competence in this matter.

##### 5. *In What Circumstances is United Nations Practice Really Evidence of Customary International Law?*

This question is, of course, closely related to others we have already discussed, but it focuses on particular aspects of the problem that merit separate examination.

How does one weigh, juridically speaking, the evidence of practice in the United Nations as compared with contrary evidence which may be made available elsewhere? This question arose in the examination of the merits of the *South West Africa Cases* between 1962 and 1966. The Applicants had claimed that there was a legal standard of non-discrimination which could be used as an aid to interpreting the meaning of the Mandatory's obligation "to promote to the utmost" the well-being of the inhabitants. They also claimed that there existed a norm of non-discrimination which was relevant not only as a guide to interpreting the Mandate, but as a general rule of international law binding on South Africa not merely as the Mandatory but as a sovereign state—in other words, a norm which is binding upon all nations. And it was suggested that the practice of various international bodies, above all the General Assembly of the United Nations, provided the evidence of this proposition. Because the 1966 Judgment found that the Applicants had not established the necessary legal interest to secure an adjudication on the merits, this claim was not examined by the Court. But it was discussed in some of the individual and dissenting opinions, and the comments of Judge Tanaka and Judge *Ad Hoc* van Wyk, are particularly interesting.

Judge van Wyk thought that the collective processes of the international community, including the resolutions of the United Nations on



racial discrimination, were not evidence of a norm of customary international law prohibiting racial separation and discrimination. He said:

Applicants did not even attempt to show any *practice* by States in accordance with the alleged norm, but relied on statements of States relating, not to the practice of those or other States, but to criticism of the Respondent's policies.<sup>18</sup>

Even if one rejects the implication that the official statements of nations are not state practice, the point that Judge van Wyk is making seems to me a very important one: namely, that to ascertain if there exists customary international law prohibiting non-discrimination, we must look not only to what states say in the United Nations, but what their own patterns of behavior reveal. And Judge van Wyk was clearly impressed by the evidence offered by South African witnesses to the effect that there is, around the world, no general observance of an alleged norm of non-discrimination, notwithstanding what states might say in United Nations bodies about South African racial policies.

Judge Tanaka took a rather different view. He did not try to claim that practice around the world indicated a general observance of a norm of non-discrimination. Rather he argued that there was United Nations activity evidencing the existence of the norm, and non-compliance in many nations could not derogate from such a norm. Clearly, Judge Tanaka thought that there was something positivistic in the view that customary law, developed through the collective processes of the United Nations, could be denied by the failure of some or even many nations to conform. In essence, Judge Tanaka suggests—and I quote—"Human rights have always existed with the human being. They existed independently of, and before, the State." Accordingly, he contends they are rooted in "natural law," and cannot be modified by the constitution or practice of states. Human rights form part of the *jus cogens*, and cannot be derogated from the shortcomings of state behavior. And the resolutions of the United Nations, and statements there made, are evidence of this deep-rooted legal norm.

Second, it seems to me that one may reasonably describe as positivistic the view that a practice is not law unless there is a superior authority to enforce it. But the proposition that evidence of the existence of custom must rest not only on words and votes, but on other manifestations of state behavior, is wrongly described as positivism. Not being a naturalist, I feel that community expectations are a proper guide to whether a practice is, or is not "law"; and that national practice which runs counter to votes recorded at the United Nations may indeed make doubtful the claim that the resolutions of the Assembly are, in this particular circumstance, evidence of customary international law.

It therefore seems to me that in this question of identifying the proper scope for law-development by the political organs of the United Nations, as in so many other questions, one's answer in the final analysis will depend upon one's conceptions of law and the legal process.

<sup>18</sup> [1966] I.C.J. Rep. 169.

I, personally, therefore, think that a strong advocacy of the law-creating rôle of the United Nations—admirably expressed as a general proposition by Judge Tanaka in the earlier part of his Opinion—does not necessarily entail going along with his view that practice within the United Nations is paramount in the face of conflicting evidence. And it is possible to take this view on this particular point even when one is on record as being very unhappy about the Judgment of the Court in 1966.

### *Conclusion*

There can be surely no doubt, twenty-five years after the founding of the United Nations, that its political organs are engaged in the lawmaking business. This lawmaking—which cannot easily be separated from clarifying, interpreting or developing—occurs in a variety of ways. These organs have some limited powers to bind Member States both directly and impliedly, and a somewhat larger power to speak authoritatively on certain legal issues. But beyond this, United Nations practice can contribute, within certain conditions, and with certain caveats which I have tried to identify in this paper, to the development of customary international law. If the past twenty years have revealed these somewhat unforeseen powers, it is essential that in the next decades we harness them rather more systematically and scientifically to the aspirations of mankind which law must play its rôle in realizing.

## THE IMPACT OF THE U.N. STRUCTURE, INCLUDING THAT OF THE SPECIALIZED AGENCIES, ON THE LAW OF INTERNATIONAL ORGANIZATION

*By D. W. Bowett \**

With so vast a canvas, Mr. Chairman, I trust I may be permitted a somewhat arbitrary definition of the topic. I propose to discuss one of the most striking phenomena of the post-Charter era, namely, the dynamic character of contemporary international organizations and the consequent creation of a vast body of "internal law." By "internal law" I mean that body of rules which governs the relations between organizations, between organs within an organization and between member states and the organization. This law embraces not only procedural rules, financial regulations and the whole corpus of administrative law but also the creation of new organs and the definition of their activities.

It is in connection with this last category that controversy may arise and the question must be posed: What are the permissible limits within which new organs and activities can be established? The answer to this question assumes increasing importance in the light of two factors. The first is that new subsidiary organs are being created, certainly within the United Nations, with activities not originally contemplated in the Charter

\* Cambridge University.

and with a degree of autonomy not normally associated with subsidiary organs: UNCTAD and UNIDO are the prime examples. Indeed, it may be said that it is now largely a matter of policy whether a new venture is established by resolution of the General Assembly or by a new intergovernmental agreement creating a specialized agency. Many of you will be aware that there is currently under debate the question whether a Deep Seabed Agency should be a United Nations subsidiary organ or a new organization entirely. The second factor which gives this question increasing importance is that internal law is created by majority decisions.<sup>1</sup> Thus, the problematical issue is whether there are limits to its creation upon which a dissenting minority of states can insist.

It is too narrow to view these limits as simply those inherent in the *ultra vires* doctrine. Certainly some limits can be framed in these terms: an objection to some new activity based on the "domestic jurisdiction" clause of the U.N. Charter is essentially an objection of *ultra vires*. In other instances, however, the objection may not go to the existence of the power—which may be conceded—but rather to the abuse of the power by its use for an improper motive or purpose. Yet again, the objection may be simply that the power has been exercised via a procedure which is defective. The activity which is truly *ultra vires* is irremediable. Activities tainted by defects of the last two categories may not necessarily be so, for it may be possible to remedy the defect by a subsequent endorsement of the initially unauthorized purpose or by rectifying the initial procedural defect.

Let us assume that an organization decides to embark upon a new activity which is not specifically envisaged in the basic, constituent treaty. There are two basic means of doing this.

First, there is formal constitutional amendment: if done in proper form, the dissenting minority must accept the change or leave the organization. I would only add that this has only rarely been used since 1945, the great majority of formal amendments being directed more to alteration of the composition of organs.

Second, there is the technique of liberal interpretation of the basic treaty: whether achieved by a "teleological" approach to interpretation<sup>2</sup> or by the doctrine of "implied powers," this interpretative process is largely in the hands of the organs themselves and produces, by majority decision, a subsequent practice which is *prima facie* evidence of the development being *intra vires*. It is the apparently unlimited scope of this approach to interpretation and its effect of enlarging the scope for creation of internal law which now gives rise to some concern.

I may remind you that one author<sup>3</sup> has cogently argued that an inter-

<sup>1</sup> See Skubiszewski, "Enactment of Law by International Organisations," 41 Brit. Yr. Bk. Int. Law 198 at 229 (1965-66).

<sup>2</sup> See Gold, "Interpretation by the I.M.F. of Its Articles of Agreement," 16 Int. and Comp. Law Q. 289 at 292 (1967).

<sup>3</sup> Seyersted, *Objective International Personality of Intergovernmental Organisations* (Copenhagen, 1963).

national organization can, by virtue of its international personality, undertake any activity permissible to a state which is not expressly prohibited by its constituent treaty. The International Court of Justice, in the *Reparations* case,<sup>4</sup> adhered to a fairly rigid view of implied powers, namely, that such powers are *intra vires* as arise by "necessary implication" from the Purposes of the Organization. More recently, in the *South-West Africa Cases*<sup>5</sup> and the *Expenses* case,<sup>6</sup> the International Court of Justice has taken a much more liberal view of what may be implied from the Purposes. However, with the United Nations itself, the Purposes are so broadly stated that, on a liberal view as to what may be implied from them, almost anything is *intra vires*. Moreover, quite apart from this consideration, it is surely open to a Member to say "I agreed to the pursuit of these Purposes by defined organs, operating in a defined way as reflected in the treaty and my agreement cannot be implied to the pursuit of these Purposes in some entirely different and unforeseen way." Thus, I would have considerable doubt whether it is permissible to apply a liberal interpretation of implicit powers where these powers are implied from the Purposes of the Organization. A more acceptable view of the implied powers doctrine is that it justifies the attribution to a particular organ of powers which are implicit in that organ's express powers. The Purposes of the Organization as a whole serve only as criteria which enable one to say whether there has been an improper use of powers, express or implied, and *not* as a basis upon which powers can be implied. A too liberal approach to interpretation, to the doctrine of implied powers and subsequent practice makes it extraordinarily difficult to determine which developments require formal amendment and which do not. Presumably only those activities which are plainly inconsistent with the clear terms of the existing constituent treaty would require formal amendment. I confess to finding this much too liberal an approach.

I have little confidence that an appeal for a more restrictive interpretation of the permissible domain of "internal law" will find favor in the practice of organs. It therefore becomes necessary to look to the measures which the dissenting minority may take in opposition to a development of internal law which they dislike. These measures appear to be the following:

(i) *Protest*.—A Member may protest by formal opposition to the development. Simple abstention from a vote is probably not enough<sup>7</sup> and the protest must presumably be in terms which make clear that the Member opposes the development because it is either procedurally irregular

<sup>4</sup> [1949] I.C.J. Rep. 174.

<sup>5</sup> See Voting Procedure Case, [1955] I.C.J. Rep. 77; and Hearings of Petitioners Case, [1956] *ibid.* 29.

<sup>6</sup> [1962] *ibid.* 151 at 167-168.

<sup>7</sup> This seems implicit in the two opinions of the P.C.I.J. on the Competence of the I.L.O. (Ser. B, Nos. 2, 3 and 12) and the current practice regarding abstention as an implied concurrence.

or an abuse of power or one which can only be made by formal amendment of the constituent treaty. It is no answer to such a protest that the Member is not a member of the particular organ in question. I agree entirely with Judge Spender in the *Expenses* case that, insofar as subsequent conduct is relevant, it is that of all the parties to the constituent treaty and not of any particular organ.

(ii) *Appeal to the Organ to remedy the defect* where this is a procedural defect or an excess of power by a subordinate organ which can be ratified by a parent organ. This, of course, is a remedy of limited application, for it cannot apply to an irremediable defect such as an act *ultra vires* the organization or a particular organ.

(iii) *Demand for a request for an Advisory Opinion*.—This is the most obvious remedy but it is not without its disadvantages. It presupposes agreement by the majority to the making of such a request and, given that this is a challenge to the legality of majority action, the majority may not agree. Moreover, the opinion, even if requested, will not be binding and, as with the *Expenses* Opinion, can be ignored. In principle, reference to an independent Commission of Jurists is possible, but again the obstacles to securing majority support for this are obvious. In practice the dissenting minority will find that a truly effective legal remedy is virtually non-existent.<sup>8</sup>

(iv) *Refusal to finance the ultra vires activity*.—This remedy may be of no avail if the development is not one involving additional finance or is placed upon a voluntary financing basis.<sup>9</sup> Even where this is not so, the remedy is effective only for the major contributors and will presumably result ultimately in a crisis because of the threat of deprivation of vote under Article 19. However, for the major contributors it is evidently a remedy in the sense that it forces the majority to think carefully about the extent to which they are prepared to disregard the minority views.

(v) *Withdrawal*.—This is the ultimate remedy and in final analysis the only truly effective one. It is deplorable, in principle, and would be unlikely to be invoked save in the case of opposition to a development of the internal law which the minority regarded as a real threat to their own interests.

Thus, in conclusion, one sees that effective restraint on an improper extension of powers or, if one prefers it, abuse of the faculty for creating internal law, depends almost wholly on political and economic pressures. These will have to suffice until, as is common in any federal system, or as exists in the European Communities, a proper constitutional court is created.

<sup>8</sup> Only in the IMCO (Constitution of the Maritime Safety Committee) Case, [1960] I.C.J. Rep. 150, has the I.C.J. held a practice unconstitutional.

<sup>9</sup> Or is in the category of "permissive" as opposed to "mandatory" functions, if Judge Sir Gerald Fitzmaurice is right in making this distinction in his Separate Opinion in the *Expenses* Case, [1962] I.C.J. Rep. 213. The author finds great difficulty in locating the basis for this distinction anywhere in the Charter, at least as regards the obligation to finance an activity.

Professor QUINCY WRIGHT thought the discussion encouraging. It showed that the world community is not without means to bring law up to date. Such means are important. The world community is not what it was in the time of Grotius, the First World War, nor even what it was at the time of the first atomic explosion. Changes due to the advancement of science and technology are going ahead more and more rapidly. Thus, development of legal methods for bringing law up to date are more and more essential. It appears that we have the means of changing written law through the International Law Commission, General Assembly, and the treaty-making process. We also have, as Dr. Higgins pointed out, means of rapid change of customary international law. No longer does it take centuries or even generations; customary law can be changed very rapidly. To make customary international law requires some body or some state to pronounce a rule that they think ought to be accepted. If evidence accumulates that there is no opposition, if all states, or substantially all states acquiesce, then it becomes customary law. This may happen in a relatively few years.

One basis that is referred to among the sources of international law in the Court's Statute—"the teachings of the most highly qualified publicists of the various nations"—should be particularly interesting to this body. In a discussion of the Board of Editors of the JOURNAL, there was a discussion on whether the JOURNAL should state peculiarly American positions on international law, or whether it should state positions that the writer thought was international law, whether it was supported by or in opposition to the position of his own country. Maintenance of the latter position seems to me extremely important. In journals of international law of whatever country or language, the writers should state what they think is international law, or what it ought to be, without any reference to the political proclivities of their own governments. In this way the writings of "publicists" may have an influence in establishing not only what the law is, but also in proposing suitable changes that should be made and that may be gradually acquiesced in.

Professor GERALD L. MORRIS asked the panel to comment on the problems encountered by Canada in seeking to develop or extend the international rules with respect to the risk of pollution in the marine environment, specifically in the Arctic. These problems raise questions concerning the machinery available in the United Nations for the development of international law. The Canadian experience was rather unfortunate when they explored possibilities of action within the U.N. apparatus. At the same time that there was a rather diffuse interest in the various organs and agencies, there was also, clearly, almost a pre-emption of the possibility of early and direct action by IMCO, which was clearly not an agency, in view of its interest in facilitating maritime commerce, that could take the sort of broad approach that was necessary for this type of problem. Canada was not only rebuffed at the Brussels Conference held last year, but actually received clear indications of reluctance on the part of some governments to assume any responsibility or to become involved in this issue. Conse-

quently, Canada felt obliged to take unilateral action that would meet the need of protection in the Arctic environment. It was partly conceived as a goad to the international community to take constructive action.

Professor MORRIS put forth two conclusions for comment by the panel. First, there is a need for the United Nations to endorse and actively support a principle of universal responsibility that would involve non-user states as well as user states, non-coastal states as well as coastal states. And second, in this situation the general responsibility of ECOSOC for the co-ordination and supervision of the activities of agencies was not sufficient to meet the need for urgent development of international legal norms. There is some need to refine and emphasize the allocation of responsibility for continuing study and appraisal of these developing international legal problems so that the most efficient and co-ordinated attack, leading to progressive development of the legal norms, can be achieved.

The CHAIRMAN, considering the question to be concerned with the constitutional adequacies, referred the question to Dr. Bowett.

Dr. BOWETT stated that this situation almost inevitably arises where the co-operation between the specialized agencies is simply co-operation. ECOSOC has no directing rôle; it is not an executive organ. It may simply argue the case for a tighter linkage between the specialized agencies and the United Nations, and, perhaps in the remote future, for the establishment of an organ that can allocate and direct the work, rather than rely on voluntary co-operation from autonomous bodies. He also noted that the Canadian action had the weakness of being unilateral. In contrast, a number of landlocked states, prior to the Law of the Sea Conference, collectively developed quite a pressure group. They formed themselves into a kind of pre-conference before the Geneva Conference met and, in the end, got themselves made a committee at that conference and at the conference itself obtained quite a degree of recognition.

Mr. STEPHEN B. COHEN noted that problems of regional organizations had played a big rôle in discussions at the World Peace through Law Conference in Bangkok. There was much discussion of the Southeast Asia Development Fund, the Kuwait-Arab Development Fund, and other such organizations which were able to operate on a non-political basis within their own sphere of influence. It was particularly within the Southeast Asia Development Fund that political overtones were overcome by the economic necessities of these countries. He asked two questions: Did the panel feel that these regional organizations are going to override and take the place of subsidiary organizations of the United Nations where there can be no majority vote because of certain political influences within the organization? And does the delay in implementation of doctrines, such as the Treaty on Environmental Responsibility, render the International Law Commission impotent to deal with these problems?

Dr. ROSENNE, commenting on the second question, stated that the decision of the International Court in the *North Sea Continental Shelf Cases*, insofar as it related to the preliminary work of the I.L.C. on the continental shelf, came as quite a shock. It indicated that the preparatory work

was not as thorough as it might have been, precisely in its non-legal aspects. The legal research had been done, but the concrete physical circumstances in which the law had to be applied did not seem to have been properly elucidated. This is a very serious criticism to have to make. Since then the I.L.C. has not been involved in that type of problem. It may well become concerned with it again in connection with specific kinds of state responsibility. In the light of the experience gained, the I.L.C. would today probably be more careful in acquainting itself with the physical realities of the problem before it advanced too far in trying to formulate the law.

Dr. BOWETT, commenting on the first question, objected to the use of the term "overriding" the global organizations. Insofar as the regional organization develops an activity that admittedly could not be developed on a global basis, because it lacked a majority, but this can be regarded as supplementary to, or merely expanding, United Nations activities, there is no problem. The problem only arises where the activities are diametrically opposed, or where the regional organization develops treaty principles of general application that are contrary to the more general norms of international law. There you get a true inconsistency. But it is the inconsistency that is the problem, not the fact that regional bodies can "override" the United Nations and go beyond what the United Nations can do through its own organs.

Dr. HIGGINS agreed with the gist of Dr. Bowett's remarks. To answer the question requires an examination of the organization concerned. There are no broad answers. Dr. Bowett has indicated those areas where a regional agency may be able to make a special and supplementary contribution. When one thinks of certain aid-giving agencies, the need for the active participation of the capital-exporting countries in certain of those is going to make an exclusively regional operation impossible. One has to look at the particular area concerned. One can see that in the field of human rights there is the greatest opportunity. Not only is one not going to get a great decision in detail on a universal basis, but, clearly, standards do vary on a perceptibly regional basis, at least so far as economic and social rights are concerned. There are now both the European and Latin American examples. One has to look to the content for an answer.

Professor SAMUEL A. BLEICHER directed a question to Mrs. Higgins. The United States announced that it would accept the Geneva Protocol on Chemical and Biological Warfare, subject to an understanding that certain kinds of gases, like tear gas, were not included. Subsequently, and in obvious response to the U. S. statement, the General Assembly passed a resolution, almost unanimously and apparently despite substantial U. S. lobbying in the opposite direction, that stated that all chemicals are included. This seems to be a situation where the General Assembly, first of all, is interpreting a treaty rather than applying custom, and, second, is not interpreting the U.N. Charter, which is the treaty you would most likely expect it to interpret. What is the efficacy of a decision like this?

Dr. HIGGINS stated that the General Assembly was actually speaking to



the point of customary international law. It was not so much saying that the 1925 Protocol had an available exception for certain comparatively new types of gases—specifically smoke and tear. It was rather saying that the general state of international law is that all such devices are prohibited and, consequently, that the 1925 Protocol must be interpreted in this way. This is a nice point, but it is an arguable one. The Assembly has gone beyond Charter interpretation, but very frequently in the peace and security area, as well as in general human rights, the Assembly has done so. One might be disconcerted to see it talking so specifically about a particular treaty, but its concern with this matter, as a matter falling quite easily under those areas of interest to the Assembly, was authorized.

As for the substance of the matter, Dr. Higgins thought the U. S. lobbying to have been valid. The interpretations, both by the United States and the United Kingdom, whereby it was said that tear gases of the CS type were excluded—for rather curious reasons given by the U.K.—are not valid. If one looks purely at the policy point of view, one is opening up unilateral interpretations of the 1925 Protocol in order to indicate, as the United Kingdom has done, that one could use it in domestic situations, which the Protocol does not cover, nor does the promise the international use would be very careful meet the point. It seems to be extraordinarily unfortunate from the point of view of reciprocity. And the wording of the Protocol is broad. The fact that these gases have subsequently been developed and are perhaps of a slightly less damaging nature than those originally envisaged, does not, it seems, authorize a unilateral interpretation of the sort we have seen by these two countries.

Mr. DAVID A. IJALAYE asked Dr. Higgins to comment on the legislative competence of the General Assembly with particular reference to the Uniting for Peace Resolution. The point has always been made that the Security Council has the primary responsibility for the maintenance of international peace and security, but where the Security Council fails, as a result of the use of the veto, the General Assembly has a secondary responsibility.

Dr. HIGGINS had difficulty seeing this as a problem of legislative competence. The argument goes to the question of whether the allocation of primary responsibility to the Security Council meant that a hitherto unspecified secondary responsibility was not available to the Assembly. The majority decided, in the particular circumstances of the time, otherwise, namely, that the primary only meant primary, and that a secondary responsibility, when the primary was unfulfilled, went to the Assembly. Further elucidation on the subject came in the *Expenses* case, where the Court sidestepped the Uniting for Peace Resolution by indicating that, insofar as the establishment of U.N. forces based on the consent of the host state was concerned, the Uniting for Peace Resolution was not necessary. The Court found that Article 14 was a sufficient basis. The resolution may thus be regarded as a device for getting matters in certain areas in a speedy way from the Security Council. But clearly no direct question of legislative competence is involved.

Dr. S. BHATT referred to Dr. Higgins' remarks that the United Nations resolution is evidence of customary international law and that it should conform to community expectations. But the heart of the problem is how to find community expectations where each country has one vote and the responsibility and the control are inadequate. How can we find some means to ascertain the consensus before a vote is taken in the United Nations? For example, the Committee on the Peaceful Uses of Outer Space of the United Nations, before it formulated any principles of space law through its resolutions, adopted unanimously, discussed the topic in many conferences. From this analogy, can we say that there is need for some sort of institutional development within the General Assembly so that we could assess "community expectation" before a resolution is passed and is deemed to be law?

Dr. ROSENNE agreed that it was necessary to create conditions for a consensus to develop, and in many cases that was done. There are very many ways, kaleidoscopic ways, in which resolutions are evolved. In the case of the Outer Space Treaty even certain non-governmental organizations were involved at stages precisely in an attempt to reach what have been called the "community expectations." In the end each subject requires its own procedures, and its own organs, and its own ways in which disciplined confrontations are organized from which the consensus and conclusions are reached.

Dr. BOWETT thought that in the majority of cases it is apparent in the General Assembly, and more so in the Security Council, what the vote is going to be, what degree of consensus there is, even prior to the resolution being put. All this is done by informal consultation between delegations. The only institution that has a formal process of consultation, almost conciliation, prior to putting the formal resolution to vote is UNCTAD. The UNCTAD procedure was designed to avoid unrealistic resolutions being adopted.

Professor MYRES McDOUGAL noted that a number of challenges have been thrown down that should not go unanswered. He had intended to ask Dr. Higgins how she would respond to Dr. Bowett's challenges concerning the competence of a minority, or a few states, to veto a law. Our Canadian friends have raised the question about the competence of a single state to make law. These questions should be explored, and the problem put by the Canadian speakers affords a good factual base from which to take off.

Professor McDOUGAL stated that he spoke from the same perspectives from which Dr. Higgins spoke and that he only wished to add that she did not, until her concluding remarks, emphasize quite so much the expectations of the audience, of the communicatees of the prescription. It is not so much the *opinio juris*, the intent of the communicators, through their language or behavior that is important, as the expectations that are created by their language and behavior in the larger community of mankind. Most discussions about how international law is made are built on a simple dichotomy between explicit agreement and customary law. If

one looks, as an anthropologist might look, at this problem, one begins with the most deliberate, the most authoritative, the most explicit efforts to create law, and moves through to the least deliberate, the least authoritative and the least explicit. There is a whole continuum from explicit agreement to customary behavior. The basic inquiry is what is the content of a projected policy, and does it, in fact, create expectations in the community not only of authority but also of control? The realistic function of customary law has been to get rid of minority veto, either in the making or the termination of a principle. It has long been held that Tobago cannot make law for the world, whether by initiative or by veto. Customary law—the most inarticulate, the least deliberate of prescriptive expressions—does build on the expectations created by people's co-operative behavior and the words they use, over a period of time, about some particular problem. Now, our Canadian friends, if they observed past co-operative behavior about the enjoyment of the oceans might see that the general community has, in the concept of the "contiguous zone," a device whereby people who regard themselves as extremely threatened and prejudiced by certain activities can unilaterally take such action as is necessary and proportionate to protect themselves. Professor McDUGAL then asked whether the Canadian action was upon its facts within this flow of customary behavior in the past, whether it could be justified by necessity and proportionality. Is Canada waiting to see whether the expectations of the rest of mankind confirm it as reasonable and say that it is in the common interest? The same question is put to Dr. Bowett in relation to what Dr. Higgins said.

The CHAIRMAN referred the question of the Canadian action to Professor Morris, who in turn referred to Professor Douglas M. Johnston, who, as an old member of the Yale fraternity, could better communicate with Professor McDougal.

Professor JOHNSTON stated that there were three distinguishable concepts already established in international law that had apparently met the expectations of the world community. The first is the concept of the contiguous zone, which was confirmed by the Geneva Conference on the Law of the Sea. Within that zone the coastal state can exercise limited authority. The Canadian initiative is an extension of the concept in a spatial sense. Most accept a contiguous zone of 12 miles because it seems spatially modest. The Canadians' claim to 100 miles is less modest. However, acceptance of the concept of the contiguous zone was also based on the notion that 12 miles was an appropriate limit for the problems and functions originally involved, as envisaged at Geneva. But pollution is a different problem, and environmental control is a different kind of function. The question is what would be an appropriate extent of a contiguous zone in view of the nature of pollution and the problem of environmental control.

The second concept is the provision, established at Geneva, that there is a universal duty to participate in measures to conserve the living resources of the sea. Professor JOHNSTON stated that this conservation principle implied a universal duty on all nations to maintain the quality of the marine environment, and, perhaps more generally, that of the total human en-

vironment. All that is suggested is the extension of an established concept.

The third established concept is the special interest of the coastal state in maintaining the productivity of the living resources of the high seas in areas adjacent to its territorial sea. Similarly, the nearest adjacent state has a special interest in maintaining the quality of the marine environment which entitles it to take reasonable measures to protect it from a wide variety of dangers, even unilaterally in the absence of internationally negotiated safeguards. What is more important than multilateral form is that the measures conform in substance with international standards. Here again there necessarily must be a legitimate extension of a concept, in light of the expanding nature of the problem of the pollution of the seas.

These are the three doctrinal grounds on which the Canadian case can rest as meeting the expectations of the international community.

Dr. HIGGINS expressed agreement with Professor Johnston's remarks. It was clear that, although claims as outlined could be made, Canada first attempted from the collective end and did not assert claims in any very specific form. She agreed with Dr. Bowett that the Canadian problem was partly political, but also partly tactical, in that Canada, in contrast to the Maltese action on the deep sea bed, did not move as adroitly in terms of getting support. In response to Professor McDougal's broader question, Dr. HIGGINS stated that there was little to add to her discussion with Dr. Bowett over the competence of a minority to veto a prescription. She reiterated that the problem of the ability of individual states to reserve their position vis-à-vis law formation depends upon the kind of law formation. In areas where substantive rights and duties are involved and where these rights are clearly in Charter terms, contrary to Dr. Bowett's position, she believes the individual nation is not able to reserve its position, given the initial peace and security authority of the United Nations. When one is talking about the law-creating areas—new areas of law such as outer space and the deep sea bed—until a final formulation has been arrived at, it is possible to reverse positions. Nor does it seem that an individual nation can reserve its position on internal questions. It depends on what one means by "are they able to." Dr. Bowett said that a strong protest was possible. Clearly it is physically possible and it is frequently done. But if we mean by "are they able to"—(a) Will the majority of nations think this a valid course of action? and (b) Would an international tribunal necessarily support them?—then perhaps one comes to different conclusions.

Dr. BOWETT replied that he was not sure that he liked Professor McDougal's formulation of the problem in terms of a minority being able to make law for the majority, or to impose a minority veto. He was concerned more with the extent to which the minority necessarily had to go along with a development that, at least as far as internal law is concerned, they regard as totally unjustified by reference to the constituent treaty from which they all start. Protest may well have some effect. If in fact the Soviet bloc had not protested the Uniting for Peace Resolution, the International Court's opinion in the *Expenses* case might well have been cast in very different terms. That opinion seems to mean that the General As-

sembly cannot now literally apply the resolution, but can make recommendations only so far as peacekeeping activities are concerned and not so far as enforcement action is concerned. That may be, in part, due to the formidable and repeated protest by the Soviet bloc.

Dr. ROSENNE thought in the framework of an international organization the question of the protection of the rights of states holding unpopular or minority views a much more serious problem than it is generally believed to be. There is a strong theory that a document like the Charter is a treaty, which means that it has to be interpreted and applied in accordance with the general law of treaties, one of the implications being that the states have agreed to confer certain competences only up to the limit laid down in the treaty; but this leads one immediately to the delicate political and philosophical problem of teleological interpretation. Comparing the voting provisions of the Charter and of the Covenant, one notes that under the Charter the minority is not very well protected. Even less is a minority protected when encouragement is given to extravagant claims to this or that process of decision, justifying it on the grounds of community expectations or teleological aids, or the like.

Dr. ROSENNE also thought that the protection of a minority supplied by the general classical law of treaties through the institution of reservations should be developed. It would not be easy to work out. The International Law Commission had had tremendous difficulty in settling the law on reservations. The fundamental purpose performed by reservations in treaty law is to give some measure of protection—sometimes a very effective measure of protection—to a state. Something along these lines must exist, buried away perhaps in organizational procedures, to protect the minority in cases where it is entitled to protection; for instance, where a given treaty is being interpreted on ground of community expectation or general constitutional principles in a far more extended way than was originally conceived.

Dr. ROSENNE, referring to Dr. Bowett's comment, stated that requesting the International Court to give an advisory opinion is, as all experience since 1946 shows, virtually useless to solve extremely delicate problems where the decision of the General Assembly to request the advisory opinion is not adopted unanimously. In comparing the advisory experience of the International Court with that of the Permanent Court, one sees that the only advisory opinions that have been at all effective in settling disputed questions—which ultimately are political disputes in the General Assembly—have been those very few cases where the request was adopted unanimously. All the others have failed completely and have brought the Court in great disrepute because the ultimate political solution was reached without regard for the Court's opinion, and frequently in a directly contrary sense.

The CHAIRMAN noted that, with respect to the interplay of unilateral action and the development of community law, movements since World War II have tended to be overwhelmingly in the direction of an extension of national, exclusive claims at the expense of international and community

rights and freedom. This is shown by the Truman Proclamation, which led to the Convention on the Continental Shelf. And now unilateral claims are spreading, expanding the continental shelf to include the continental slope and the continental rise, and thus leading to substantial appropriation of large parts of the ocean bed. Similarly, the result of the Canadian claim to a 100-mile zone of exclusive policing of pollution is likely to lead to parallel claims by other nations rather than the creation of international institutions. As international lawyers we must be aware of this negative trend—negative from the viewpoint of international law-making, international institutions, and the international community.

MISS CARYN GOLDENBERG asked, considering the current trend in international law to ameliorate human conditions and the increasing concern over human rights, whether the panelists foresaw the individual playing an effective rôle as the subject rather than the object of international law. And if so, in what areas is it most feasible?

DR. HIGGINS saw no adequate answer to the question. There have been some small advances in the rôle of the individual. With regard to his duties directly to international law, one obviously thinks of the Nuremberg principles and all that flows from them in terms of claims being made within individual countries about non-participation in wars being permissible if the war is regarded as illegal. One sees some beginnings of the individual making claims and using international law this way. One also clearly sees the other major area as the human rights field. Certainly in the Council of Europe one has direct access to international organs by individuals over the heads of their governments. The progress is terribly small. It is hard to see in what other area any major advance is likely to happen. Most of the nations of the world—the new together with the old—have a community of interest in not encouraging this trend very greatly.

DR. ROSENNE stated that the answer, hopefully, was yes, but that it was necessary to be prepared for a very long haul. He expressed personal disappointment that the International Law Commission had missed an opportunity to deal with a small segment of the problem—the relation of the individual to international treaty law. In 1964 Sir Humphrey Waldock had been very anxious to have something on the subject in the articles, but the Commission was strongly against him. The subject did not come to a vote in any form.

DR. BOWETT added that there are a great number of committees now, particularly within the U.N. system, that hear individuals, e.g., the Committee of Twenty-Four, the Committee of Three which is touring the Middle East. More and more of these committees are receiving information directly from individuals. To that extent individuals are getting a *locus standi* that is fairly novel. How far obligations—responsibilities on individuals—can be imposed is another question. It may be that hijacking will be a case where obligations under international law might be imposed upon individuals.

A speaker from the floor directed four questions to Mrs. Higgins. First, has there been, in the last 25 years, any change in the Soviet attitude toward

international law? Second, various opinions of the International Court of Justice indicate an artificial distinction between general and customary international law. Is such a distinction valid? Third, what is the significance of a minority veto? And how can a minority be prevented from blocking law formation? Fourth, would she comment on the proposition that it is possible to conceive a general consensus as different from customary international law? Consensus is a matter of ascertaining law. It takes place from different perspectives.

Dr. HIGGINS replied, first, that she saw no change in Soviet attitudes toward customary international law. The Soviet Union felt its minority position. It still prefers bilateral agreements, working on a one-to-one basis. Otherwise, it prefers a multilateral approach, with rights of reservation. This position has been maintained.

Second, she denied any intent to distinguish between general and customary international law, at least in the context of her paper. She had used the terms synonymously.

Third, in her discussion she had been more concerned with the rights of nations—situations where a state properly could or could not reserve its position.

Fourth, with respect to consensus and customary international law, she noted that consensus goes to showing *opinio juris*. Consent is based on the sovereignty of states and consensus has less a base in sovereignty.

The CHAIRMAN noted, with respect to the first question, that Judge Koretsky had based certain of his arguments in his separate decision in the *North Sea Continental Shelf Cases* on general principles of international law.

Professor JOHN WOLFF raised the question whether new states are bound by existing rules of customary international law. What authority was there for a state being bound without its consent?

Dr. ROSENNE referred to the *Norwegian Fisheries* case, in which Norway's consistent claim to a four-mile limit for her territorial sea was accepted. But the proposition was not that any state would not be bound without its consent, but that every new state would not be bound without its consent. Discussion of the issue was widespread in the older literature, going back to the 19th century, but now, in the new literature, it has become a political issue which needs a political solution. The present-day codification conferences were a practical political answer to this problem.

Mr. LOUIS SOHN commented that the declarations adopted unanimously by the General Assembly have different status from ordinary resolutions. The effect of a declaration may be further strengthened by the inclusion in its text of a statement that it shall be faithfully observed. This was done, for instance, in the Declaration on the Granting of Independence to Colonial Countries and People and in the Declaration on the Elimination of All Forms of Racial Discrimination. In a similar manner, an obligation to comply with a declaration may be embodied in a later instrument. Thus, though the Universal Declaration of Human Rights was not considered binding at the time of its adoption, the practice of the United Nations and

the two later Declarations previously mentioned acknowledged the binding character of the Universal Declaration, and by that very fact conferred that character on it. In this manner, by a unanimous decision of a preponderant majority of the world community new customary international law can be created.

Professor JOSEPH CHACKO asked Dr. Higgins if she could explain the term "binding" as she had used it in her statement that political organs were making "binding decisions." Could she give any examples of acceptance of such binding decisions by member governments? Can we say that a consensus is binding? What is the result of such consensus if a nation in its own interest violates these binding decisions?

Dr. HIGGINS replied that the first question resulted from a misunderstanding of her remarks. Only the Security Council passes binding resolutions. Her remarks went to the broader problem of the introduction of non-binding resolutions into customary international law.

In certain new and technical areas community consensus was indeed being revealed, not by a single vote, but by an elaborate and prolonged quasi-judicial process. Such processes seem to be better handled *ad hoc*, rather than any formal institutional pattern being insisted upon.

Mrs. KAYE HOLLOWAY asked Dr. Higgins why, in discussing the legislative competence of the General Assembly, she did not refer to the adoption by a small majority of a resolution accepting the decision of the International Court of Justice in *Reservations to the Convention on Genocide*. The Assembly had asked for the opinion of the Court on a specific point, but, in accepting the decision, went further and established a new rule on treaty reservations that abrogated a rule of 150 years' duration. The situation called for no law on reservations, but it has today become law.

Dr. HIGGINS replied that Mrs. Holloway has shown in her work that a single resolution can lead to the redevelopment of law. She validates my arguments, even though she may consider the particular development undesirable.

Dr. ROSENNE added that, although the Assembly had accepted the Court's concept of reservations by only a small majority, the relevant articles of the Vienna Convention had been adopted by the Vienna Conference by a virtually unanimous vote. This was a good example of how opinion on a difficult subject could develop.

Professor MAXWELL COHEN stated that much of the discussion turns on the determination of the "credibility" of international law. The problem of credibility involves many factors, particularly the determination of credibility of particular rules at a given time. However, this was a typical problem of "lawyership." He also noted that, with respect to Professor McDougal's questioning the justification of "unilateral" lawmaking, that unilateral lawmaking had respectable U. S. antecedents. There is the example of President Kennedy's unilateral acts in the Cuban missile crisis. They were in response to an urgent and dangerous situation. The Canadian so-called unilateral act with respect to Arctic pollution is a response to such a dangerous situation.



Miss JANE PICKER raised a question about third-party rights in treaty law. She recalled claims by Soviet jurists that space-spying was contrary to international law. The Chicago Air Convention was cited as requiring permission for overflights. They also argued that requirement of permission was imposed by customary international law. Formally, this raises the question whether a non-signatory can claim treaty rights, whether the provisions are also customary law or not, that can be enforced.

Dr. ROSENNE noted that the whole topic of treaties and third states had been closely examined by the International Law Commission, and its proposals had been incorporated in the Vienna Convention. At the same time, Articles 38 and 43, as well as the preamble to the Vienna Convention, contained general reservations on the difficult question of the relations between treaty law and customary international law.

The CHAIRMAN thereupon declared the session adjourned.

## SECOND SESSION

Friday, April 24, 1970, at 8:15 p.m.

### The United Nations and Legal Aspects of the Search for Peace in the Middle East

The session convened at 8:15 o'clock p.m. in the Jade Room of the Waldorf Astoria Hotel. Professor ROGER D. FISHER of the Harvard Law School presided and introduced the speakers.

### LEGAL ASPECTS OF THE SEARCH FOR PEACE IN THE MIDDLE EAST

*By Eugene V. Rostow \**

The topic set for the discussion tonight—legal aspects of the search for peace in the Middle East—must of course be examined, like any other legal problem, in the context of history and policy. The processes of politics which have been at work in the Middle East for more than sixty years make the famous Near Eastern Question of the nineteenth century seem like a children's game. The Near East has in fact plagued world politics for centuries. Disraeli's celebrated remark could have been made by nearly all his predecessors, and by all his successors. Over and over again, local rivalries, conflicts and enmities, bitter in themselves, have become irreconcilable when linked to the conflicting aspirations and fears of world Powers.

Since the focal point of our concern is the present and the future, I shall do no more than recall the break-up of the Turkish Empire, and the rise of Zionism and of Arab nationalism, during the first World War; the dissolution of French and British security positions, during and after the second World War; the emergence of Soviet ambition in the area, and its connection first with the Zionist cause, as a device to drive the British out of the Eastern Mediterranean, and then with the Arab dream of destroying Israel, as the catalyst for transformations greatly in its interest; and the special rôle of the United Nations in the creation of Israel in 1947, and in the wars and controversies which have swirled around it ever since.

Against this background, and that of customary international law, the effort to achieve a condition of peace in the Middle East—or at least a condition of peace between Israel and its neighbors—is taking place within a sharply defined legal framework. Three sets of documents are of primary importance in delineating that framework: the Armistice Agreements of 1949;<sup>1</sup> the Cease-Fire Resolutions of the Security Council, of June,

\* Sterling Professor of Law and Public Affairs, Yale University.

<sup>1</sup> 42 U.N. Treaty Series 303, No. 656 (1949) (with Jordan); *ibid.*, 327, No. 657 (1949) (with Syria); *ibid.*, 251, No. 654 (1949) (with Egypt); *ibid.*, 287, No. 655 (1949) (with Lebanon).

1967;<sup>2</sup> and the Security Council Resolution of November 22, 1967.<sup>3</sup> Other documents and rules of law are germane—the Tripartite Declaration of 1950,<sup>4</sup> for example, and successor statements, including the Eisenhower Middle East Resolution of March 9, 1957, which was amended and re-affirmed in 1961;<sup>5</sup> the Security Council resolutions on belligerency, the Suez Canal, and many other subjects; and the 1953 Convention on the Territorial Sea.<sup>6</sup> But the three documents I first listed dominate the problem, because they represent and embody rare moments of agreement on basic issues, made by the parties, and supported by the great Powers.

In view of my involvement in these problems for a time as an official of our Government, let me make explicit what will in any event be plain: that I shall take a position here which represents not only my personal and professional opinions, but those of American policy as well—American policy, be it said, increasingly conscious of Soviet penetration of the Middle East, and necessarily concerned to prevent Soviet hegemony.

I shall start, if I may, with Security Council Resolution No. 242, of November 22, 1967, for I consider it to be primary. That resolution was achieved after more than five months of intensive diplomatic effort on the part of the United States, Great Britain, Denmark, Canada, and a number of other countries. The history of that effort gives the text a very plain meaning indeed.

It will be recalled that when large-scale hostilities erupted on June 5, 1967, the Soviet Union blocked American cease-fire proposals for several days, until it realized what was happening in the field. Then, when the Cease-Fire Resolutions were finally in place, a major diplomatic campaign, extending around the world, was brought into focus first in the Security Council; then in the General Assembly; then at Glassboro; and finally back in the Security Council.

A number of positions emerged. Their interplay, and the resolution of that interplay, is reflected in the resolution itself.

The Soviet Union and its chief Arab associates wished to have Israel declared the aggressor and required, under Chapter VII if possible, to withdraw to the Armistice Demarcation Lines as they stood on June 5th, in exchange for the fewest possible assurances<sup>7</sup>: that after withdrawal, Israeli maritime rights in the Strait of Tiran would be “no problem” (sometimes the same thought was expressed about the Suez Canal as well); and that after Israeli withdrawal the possibility could be discussed of a document that might be filed with the Secretary General, or of a Security Council resolution, that would finally end any possibility of claiming that a “state of belligerency” existed between Israel and her neighbors.

<sup>2</sup> Security Council Res. 233, 234, 235, 236 (1967); 62 A.J.I.L. 303-304 (1968).

<sup>3</sup> Security Council Res. 242 (1967); 62 A.J.I.L. 482 (1968).

<sup>4</sup> 22 Dept. of State Bulletin 886 (1950).

<sup>5</sup> 71 Stat. 5, P.L. 87-5, March 9, 1957; 75 Stat. 463, P.L. 87-195, Sept. 4, 1961.

<sup>6</sup> 15 U. S. Treaties 1606, T.I.A.S., No. 5639; 516 U.N. Treaty Series 205; 52 A.J.I.L. 834 (1958).

<sup>7</sup> See, e.g., U.N. Doc. S/PV.1351, pp. 21-27, June 8, 1967.

The Israeli position was that the Arab governments had repudiated the Armistice Agreements of 1949 by going to war; that the parties should meet alone, and draw up a treaty of peace; and that until negotiations for that purpose began, Israel would not weaken its bargaining position by publicly revealing its peace aims, although the Prime Minister and the Foreign Minister did state publicly and officially that Israel had no territorial claims as such, but was interested in the territorial problem only insofar as issues of security and maritime rights, and, of course, the problem of Jerusalem, were concerned. Meanwhile, Israel began its administration of Jerusalem, the West Bank, the Golan Heights, the Gaza Strip and Sinai as the occupying Power under the Cease-Fire Resolutions, justifying its policies "at the municipal level," and without annexations, in the perspective of that branch of international law.<sup>8</sup>

The United States, Canada, most of the West European and Latin American nations, and a large number of nations from other parts of the world, supported a different approach, which ultimately prevailed.

In view of the taut circumstances of May and June, 1967, no majority could be obtained, either in the Security Council or the General Assembly, to declare Israel the aggressor. The question of who fired the first shot, difficult enough to resolve in itself, had to be examined as part of a sequence of Byzantine complexity: the false reports of Israeli mobilization against Syria; the removal of U.N.E.F. forces from the Sinai and the Gaza Strip; the closing of the Strait of Tiran; the mobilization of Arab forces around Israel, and the establishment of a unified command; and the cycle of statements, propaganda, speeches and diplomatic efforts which marked the final weeks before June 5. Before that mystery, sober opinion refused to reach the conclusion that Israel was the aggressor. No serious attempt was made to obtain a resolution declaring the United Arab Republic to be the aggressor.

Secondly, the majority opinion both in the General Assembly and in the Security Council supported the American view, first announced on June 5, 1967,<sup>9</sup> and stated more fully on June 19, 1967,<sup>10</sup> that after twenty bitter and tragic years of "war," "belligerency," and guerrilla activity in the Middle East, the quarrel had become a burden to world peace, and that the world community should finally insist on the establishment of a condition of peace, flowing from the agreement of the parties.

Third, the experience of the international community with the understandings which ended the Suez Crisis of 1956-1957 led to the conclusion that Israel should not be required to withdraw from the cease-fire lines

<sup>8</sup> Stone, *No Peace—No War in the Middle East* 7-20 (1969); E. Lauterpacht, *Jerusalem and the Holy Places* 50-51 (1968); McNair and Watts, *The Legal Effects of War*, Ch. 17 (1966); Gutteridge, "The Protection of Civilians in Occupied Territory," *The Yearbook of World Affairs* 290 (1951); Stone, *The Middle-East under Cease Fire* 10-13 (1967); Gazit, *Israel's Policy in the Administered Territories* (1969); *Government of Israel, Two Years of Military Government, 1967-1969*, (1969).

<sup>9</sup> 56 Dept. of State Bulletin 949-953 (1967).

<sup>10</sup> President Johnson, "Principles for Peace in the Middle East," 57 Dept. of State Bulletin 31 (1967).

except as part of a firm prior agreement which dealt with all the major issues in the controversy: justice for the refugees; guarantees of security for Israel's border, and her maritime rights in the Gulf of Aqaba and the Suez Canal; a solution for Jerusalem which met the legitimate interests of Jordan and of Israel, and of the three world religions which regard Jerusalem as a Holy City; and the establishment of a condition of peace.

In 1957, in deference to Arab sensitivity about seeming publicly to "recognize" Israel, to "negotiate" with Israel, or to make "peace" with Israel, the United States took the lead in negotiating understandings which led to the withdrawal of Israeli troops from the Sinai, and the stationing of U.N.E.F. forces along the Sinai border, in the Gaza Strip, and at Sharm-el-Sheikh. The terms of that understanding were spelled out in a carefully planned series of statements made by the governments both in their capitals, and before the General Assembly. Egyptian commitments of the period were broken one by one, the last being the request for the removal of U.N.E.F., and the closing of the Strait of Tiran to Israeli shipping in May, 1967. That step, it was clear from the international understandings of 1957, justified Israeli military action under Article 51 as an act of self-defense.<sup>11</sup>

Fourth, while the majority approach always linked Israeli withdrawal to the establishment of a condition of peace through an agreement among the parties which would also resolve long-standing controversies about the refugees, maritime rights, and Jerusalem, the question remained, "To what boundaries should Israel withdraw?" On this issue, the American position was sharply drawn, and rested on a critical provision of the Armistice Agreements of 1949. Those agreements provided in each case that the Armistice Demarcation Line "is not to be construed in any sense as a political or territorial boundary, and is delineated without prejudice to rights, claims or positions of either Party to the Armistice as regards ultimate settlement of the Palestine question."<sup>12</sup> Many other provisions of each Agreement make it clear that the purpose of the Armistice was "to facilitate the transition from the present truce to permanent peace in Palestine" and that all such non-military "rights, claims, or interests" were subject to "later settlement" by agreement of the parties, as part of the transition from armistice to peace.<sup>13</sup> These paragraphs, which were put into the agreements at Arab insistence, were the legal foundation for the controversies over the wording of paragraphs 1 and 3 of Security Council Resolution 242, of November 22, 1967.<sup>14</sup>

<sup>11</sup> Many of the critical documents appear in Department of State, United States Policy in the Middle East, September, 1956-June, 1957 (1957, esp. pp. 332-342; United States Congress, Senate Committee on Foreign Relations, "A Select Chronology and Background Documents Relating to the Middle East," prepared by the Library of Congress, Legislative Reference Service (1967, rev. ed., 1969). See also H. Finer, Dulles over Suez (1964), Chs. 17 and 18.

<sup>12</sup> 42 U.N. Treaty Series, 256, Art. V, par. 2 (1949).

<sup>13</sup> *Ibid.*, Preamble, p. 252; Art. I, p. 252; Art. IV, par. 3, p. 256; Art. XI and Art. XII, p. 268.

<sup>14</sup> "The Security Council . . .

That resolution, promulgated under Chapter VI of the Charter, finally received the unanimous support of the Council. It was backed in advance by the assurance of the key countries that they would accept the resolution and work with Ambassador Jarring to implement it.

It is important to recall what the resolution requires. It calls upon the parties to reach "a peaceful and accepted" agreement which would definitively settle the Arab-Israeli controversy, and establish conditions of "just and lasting peace" in the area in accordance with the "provisions and principles" stated in the resolution. The agreement required by paragraph 3 of the resolution, the Security Council said, should establish "secure and recognized boundaries" between Israel and its neighbors "free from threats or acts of force," to replace the Armistice Demarcation Lines established in 1949, and the cease-fire lines of June, 1967. The Israeli armed forces should withdraw to such lines, as part of a comprehensive agreement, settling all the issues mentioned in the resolution, and in a condition of peace.

On this point, the American position has been the same under both the Johnson and the Nixon Administrations. The new and definitive political boundaries should not represent "the weight of conquest," both Administrations have said; on the other hand, under the policy and language of the Armistice Agreements of 1949, and of the Security Council Resolution of November 22, 1967, they need not be the same as the Armistice Demarcation Lines.<sup>15</sup> The walls and machine guns that divided Jerusalem need not be restored. And adjustments can be made by agreement, under paragraph 2 of Security Council Resolution 242, to guarantee maritime rights "through international waterways in the area," and, equally, to guarantee "the territorial inviolability and political independence of every State in the area, through measures including the establishment of demilitarized zones."<sup>16</sup>

---

"(1) Affirms that the fulfilment of Charter principles requires the establishment of a just and lasting peace in the Middle East which should include the application of both the following principles:

- (i) Withdrawal of Israeli armed forces from territories occupied in the recent conflict;
- (ii) Termination of all claims or states of belligerency and respect for and acknowledgement of the sovereignty, territorial integrity and political independence of every State in the area and their right to live in peace within secure and recognized boundaries free from threats or acts of force;

"(2) Affirms further the necessity

- (a) For guaranteeing freedom of navigation through international waterways in the area;
- (b) For achieving a just settlement of the refugee problem;
- (c) For guaranteeing the territorial inviolability and political independence of every State in the area, through measures including the establishment of demilitarized zones."

<sup>15</sup> Speech by President Johnson, Sept. 10, 1968, 59 Dept. of State Bulletin 348 (1968); Speech by Secretary Rogers, Dec. 9, 1969, 62 Dept. of State Bulletin 7 (1970).

<sup>16</sup> See note 14 above.

This is the legal significance of the omission of the word "the" from paragraph 1 (i) of the resolution, which calls for the withdrawal of Israeli armed forces "from territories occupied in the recent conflict," and not "from *the* territories occupied in the recent conflict." Repeated attempts to amend this sentence by inserting the word "the" failed in the Security Council. It is therefore not legally possible to assert that the provision requires Israeli withdrawal from *all* the territories now occupied under the Cease-Fire Resolutions to the Armistice Demarcation Lines.

This aspect of the relationship between the Security Council Resolution of November 22, 1967, and the Armistice Agreements of 1949 likewise explains the reference in the resolution to the rather murky principle of "the inadmissibility of the acquisition of territory by war."<sup>17</sup> Whatever the full implications of that obscure idea may be, it would clearly permit the territorial adjustments and special security provisions called for by the Security Council resolution<sup>18</sup> and the Armistice Agreements of 1949.

The resolution provided that the Secretary General should appoint a representative to consult with the parties, and assist them in reaching the agreement required by paragraph 3 of the resolution.

I might add a word on the much mooted question of who has "accepted" the resolution. As I indicated earlier, this is not a real issue, since the key parties to the hostilities had given advance assurances that they would co-operate with the Secretary General's representative to promote the agreement called for by the resolution. Shortly after Ambassador Jarring had begun his consultations in the area, however, the question emerged, in the form of Arab insistence that Israel indicate its "acceptance" of the resolution, or its "implementation" of the agreement, before discussions could proceed. One version of these proposals would be that Israel withdraw to the Armistice Demarcation Lines, as they stood on June 4, 1967, in advance of negotiations on any other problems of the resolution. This position, of course, would violate the text of the resolution, and the experience of broken promises which the text reflects.

A good deal of the diplomatic history of this problem is reported in Foreign Minister Eban's comprehensive speech to the General Assembly on October 8, 1968.<sup>19</sup> The Israeli position is summarized in the statement of May 1, 1968, made to the Security Council by the Israeli Permanent Representative to the United Nations:

In declarations and statements made publicly and to Mr. Jarring, my Government has indicated its acceptance of the Security Council resolution for the promotion of agreement on the establishment of a just and lasting peace. I am also authorized to reaffirm that we are willing to seek agreement with each Arab State on all matters included in that resolution.

On May 31, 1968, Foreign Minister Eban reiterated this statement in the Israeli Parliament.

<sup>17</sup> Security Council Res. 242 (1967), Preamble.

<sup>18</sup> See S. M. Schwebel, "What Weight to Conquest?", 64 A.J.I.L. 344 (1970).

<sup>19</sup> U.N. General Assembly, 230th Plenary Session, p. 1686.

Corresponding statements have been made publicly and privately by other parties to the conflict, but without specific reference to the requirement of "agreement" in paragraph 3 of the resolution. The Government of the United Arab Republic has repeatedly said that it accepts the resolution as requiring "a package deal," but it has thus far rejected procedures for consultation and negotiation accepted by other parties to the conflict.

There is great skepticism among the parties: a skepticism altogether natural against the background of more than twenty years of history. The Arabs fear that Israel has no intention of withdrawing, even to secure and recognized boundaries; Israel fears that the Arabs have no intention of making peace.

But Israel has said repeatedly and officially that it has no territorial claims as such; that its sole interest in the territorial problem is to assure its security, and to obtain viable guarantees of its maritime rights; and that, even on the difficult issue of Jerusalem, it is willing to stretch its imagination in the interest of accommodating Jordanian and international interests in the Holy City.

These assurances by Israel have been the foundation and the predicate of the American position in the long months since June, 1967. If the Arabs are skeptical of Israeli professions, their remedy is obvious: put them to the test of negotiation. They could be sure, as Prime Minister Golda Meir remarked the other day, that the position of the United States in the negotiating process would come more than half way to meet their claims.

To this point, however, it has proved impossible to initiate the final stages of the processes of consultation and negotiation which are necessary to the fulfillment of the resolution. The reason for the stalemate is simple. The Government of the United Arab Republic has refused to implement the resolution. And thus far it has been backed in that posture by the Soviet Union. President Nasser could not long persist in this stand against the will of the Soviet Union. Under these circumstances, and in the nature of Arab opinion, no other party to the conflict can move towards peace.

In this connection, Secretary Rogers' recent comment is illuminating. He stated:

We have never suggested any withdrawal until there was a final, binding, written agreement that satisfied all aspects of the Security Council resolution.

In other words, we have never suggested that a withdrawal occur before there was a contractual agreement entered into by the parties, signed by the parties in each other's presence, an agreement that would provide full assurances to Israel that the Arabs would admit that Israel had a right to exist in peace.

Now, that is what has been lacking in the past. The Arabs have never been willing to do that; and if that could be done, we think it would be a tremendous boon to the world.



Now, we have also provided that the security arrangements would be left to the parties to negotiate, such as Sharm-al-Shaykh, and the Gaza Strip, the demilitarized zone, and so forth.<sup>20</sup>

It is easy to understand the Soviet position, and that of the United Arab Republic, in terms of a policy of political and military expansion which threatens not only Israel, but Jordan, Lebanon, Saudi Arabia and the states of the Persian Gulf. It is not, however, a posture easy to reconcile with the terms and purposes of the Security Council Resolution of November 22, 1967.

## THE MIDDLE EASTERN CRISIS

*By Quincy Wright \**

There have been periodic crises in the Middle East since history began, notably since the chosen people, heeding the voice from the burning bush, escaped Egyptian persecution by invading the land of the Canaanites. Egyptian, Hittite, Assyrian, Persian, Greek, Roman, Byzantine, and Crusader remains, as well as evidences of Turkish, French, British, Arab, and Jewish occupations in more recent times, attest these struggles. The present crisis began with the Balfour Declaration during World War I, while Britain and the Arabs were fighting Turkey. It assured a national home for the Jewish people in Palestine.

Under the British Mandate which affirmed the Declaration and also the rights of the Arab people, there was comparative tranquillity for a decade. The Jewish population increased from eleven to eighteen percent in the predominantly Arab state, but the advent of Hitler induced large-scale Jewish immigration to Palestine until the Jews were over thirty percent of the population. This caused serious anxiety among the Arabs, sporadic hostilities, a Zionist demand for a Jewish state and, in 1947, a British declaration that it would withdraw and turn the problem over to the United Nations. A General Assembly resolution of November 29, 1947, partitioned Palestine into a Jewish state, an Arab state, and an international state of Jerusalem, all to be closely related economically.

The Arabs refused to accept partition, which seemed to violate Article 80 of the United Nations Charter protecting the rights of the "peoples" of Palestine under the Mandate. The Jews prepared to occupy the area awarded to them, the Arabs resisted. Israel was recognized by the United States, the Soviet Union and other states in May, 1948. Hostilities ensued, half a million Arabs fled from Israel, United Nations mediator Count Bernadotte was assassinated by Jewish terrorists, and armistices were concluded in 1949, through the mediation of Ralph Bunche who had succeeded Count Bernadotte, along the existing occupation lines giving Israel fifty

<sup>20</sup> 62 Dept. of State Bulletin 218-219 (1970).

\* University of Virginia.

percent more territory than that awarded by the partition resolution, including the western area of Jerusalem. Israel was admitted to the United Nations on May 11, 1949.

The Arabs considered themselves in a state of war with Israel and closed the Suez Canal and the Gulf of Aqaba to Israeli shipping. The Armistice was imperfectly observed. Arab "Fedayeen" raids and Israeli retaliations often came before the United Nations. In 1956 Israel sought further increase in its territory and, supported by an Anglo-French invasion of the Suez area to protect the Canal, invaded Sinai allegedly for security and opening of the waterways to its shipping. The United Nations General Assembly, after the British and French had vetoed a Security Council resolution, approved a resolution supported by the United States and the Soviet Union, insisting on the Charter principle prohibiting use or threat of force in international relations against the territorial integrity or political independence of any state, and demanding withdrawal of Israeli, British, and French forces from the territories they had occupied. These withdrawals were effected after Egypt had agreed to the stationing at its discretion of a United Nations force on its side of the Israeli-Egyptian armistice line. Israel had refused to allow the force on its side of the line and had been assured of the right to navigate through the Straits of Tiran and the Gulf of Aqaba to its port of Eilat at the end of the Gulf. The United Nations had in 1952 unsuccessfully asserted the right of Israel to free navigation in the Suez Canal.

Although these arrangements maintained comparative tranquillity for ten years, the Arabs continued to maintain that they were in a state of war with Israel, there were occasional raids and retaliations across the armistice lines, and in the spring of 1967 President Nasser of Egypt closed the Gulf of Aqaba to Israeli shipping, moved forces into Sinai alleging that Israel was preparing for an attack on Nasser's ally, Syria, and told the United Nations that it must withdraw its force from the border. Secretary General U Thant acquiesced in this demand after Israel had again refused to permit the force to go to its side of the border. Some members of the force had been killed in border hostilities and India had said that it would withdraw its contingent from the force in any case.

In June, Israel, claiming that Egypt's actions and preparations for military attack by both Egypt and Syria indicated aggressive intent, although Nasser had said he would not initiate hostilities, invaded Sinai, destroyed the Egyptian air force, occupied the Gaza Strip and Sinai, and also the Golan Heights in Syria, the West Bank of the Jordan, and Jordan Jerusalem. The Security Council promptly passed Cease-Fire Resolutions which were finally accepted by Israel and the Arabs, leaving Israel in occupation of more than twice the territory it had been occupying under the Armistices of 1949. The General Assembly met in July and passed a resolution calling upon Israel not to take any action which would change the status of Jerusalem. This was in response to Israel's law of June 27 extending "the operation of Israeli law, jurisdiction and administration to the eastern part of Jerusalem," generally interpreted to imply "annexa-

tion," although Israel denied this, saying its law was merely intended to "furnish a legal basis for the protection of the Holy Places of Jerusalem."

On November 22, 1967, on British initiative, the Security Council unanimously passed a resolution providing a basis for permanent settlement of the situation based on the principle of "the inadmissibility of the acquisition of territory by war" and "the need to work for a just and lasting peace in which every State in the area can live in security." The term "war," I assume, meant "war in the material sense" or, as stated in the Charter, the use of force in international relations. Its detailed provisions called for "withdrawal of Israeli armed forces from territories occupied in the recent conflict" and "termination of all claims or states of belligerency and respect for and acknowledgment of the sovereignty, territorial integrity and political independence of every State in the area and their right to live in peace within secure and recognized boundaries free from threats or acts of force." In addition it called for freedom of navigation in the international waterways, just settlement of the refugee problem, and guarantees of "territorial inviolability and political independence of every State in the area, through measures including the establishment of demilitarized zones."

Negotiations have continued through United Nations representative Gunnar Jarring and among the great Powers, but no progress toward settlement is evident. Egypt, Jordan and Lebanon have publicly asserted that they accept the Security Council resolution in full but refuse to negotiate on permanent boundaries as long as the disputed territory is occupied by Israel. Israel has said that it desires peace but will not withdraw from occupied territories until its Arab neighbors have agreed in direct negotiations to permanent boundaries. Later statements suggested that indirect negotiations might be acceptable. Some Israeli statesmen, including General Dayan and former Prime Minister Eshkol have publicly stated that Israel will never withdraw from all of the occupied territories, apparently including Jerusalem, the Golan Heights of Syria, the Gaza Strip, and the Sharm-el-Sheikh, the Sinai area overlooking the Straits of Tiran.

I believe that the Security Council resolution provides a basis for settlement, and do not believe the deadlock can be broken unless the Security Council insists on Israeli withdrawal from the occupied areas and establishment of a United Nations force, composed of contingents from smaller nations to occupy these areas until permanent boundaries have been established. Such a procedure settled the West Irian situation of 1961. Under conditions of equality, it is to be hoped that boundaries will be established by direct negotiations, by indirect negotiation through a mediator as successfully applied in the "Rhodes formula" of 1949, or by agreement to submit to arbitration; but in any case the boundaries should be defined in a treaty ratified by the parties. The Security Council might further insist that unless the boundary settlement is achieved within a year, it will assume authority to decide on the boundary by arbitration. It would seem to have this power because of the serious threat to peace

presented by the existing situation and the Council's responsibility under Article 39 of the Charter to maintain international peace and security in case of such a threat. The Treaty of Lausanne of 1924, it may be recalled, gave the League of Nations Council authority to decide the Mosul dispute between Turkey and Great Britain as Mandatory of Iraq, if the parties had not reached a settlement within a year, and its decision settled the dispute.

Once the boundary is settled and the Arab renunciation of belligerency and recognition of Israel have taken effect, according to their acceptance of the Security Council resolution, the problems of opening the waterways, of the refugees, of suitable guarantees, and of demilitarized zones should be dealt with. The United Nations has a special responsibility to achieve a settlement, not only because of its commitment under the resolution of November, 1967, but also because of its rôle in establishing Israel as a state by the partition resolution of 1947 and its general responsibility to maintain international peace and security.

The principle of no acquisition of territory by war seems of major importance not only to settle the Middle Eastern situation, and to prevent a dangerous confrontation between the super-Powers, but also to maintain a basic principle of international law essential for international peace and security everywhere. This principle is implicit in the international law of the 19th century which held that military occupation of the territory of a recognized state gave no title to the occupied territory. It was affirmed in the Pan American Conference of 1890 and in the Bogotá Charter of the Organization of American States in 1948 as a principle of American international law, that territory could not be acquired by conquest; in the League of Nations Covenant which guaranteed the territorial integrity and political independence of its Members against external aggression; and in the Kellogg-Briand Peace Pact of 1928 by which the parties renounced war as an instrument of national policy applied in the Manchurian situation by the Stimson Doctrine of 1932. The Atlantic Charter opposing territorial acquisitions in World War II, the Nuremberg Charter and Trial punishing the crime against peace on the bases of the Kellogg-Briand Pact, also affirmed this principle.

The principle of no acquisition of territory by war or, in terms of the Charter, no use or threat of force in international relations against the territorial integrity of any state, goes beyond the principle of "no fruits of aggression." It asserts that a military occupation, even if justified by defense necessities or United Nations authorization, cannot give title to the occupied territory. Article 51 of the Charter permits defensive action against armed attack only until the Security Council has taken measures necessary to maintain international peace and security. Modern international law, affirmed by the Stimson Doctrine, holds that a treaty made by duress against the state is invalid. In view of the age-long habit of acquiring territory and other political advantages by the use of force, and the efforts to do so even in recent times, skeptics may say this principle cannot be maintained, and they may add that it ought not to be

maintained because no *status quo* can be permanent, change is necessary, and it cannot be achieved without force. These positions overlook the radical changes in the efficacy of military force brought about by modern technological developments. They also overlook the possibility of developing procedures for peaceful change by quasi-legislative authority and powers of eminent domain in international organization, as suggested by President Wilson in his proposals for the League of Nations and in recent proposals for developing the United Nations. In the middle of World War II before the atomic age, President Roosevelt and Prime Minister Churchill expressed their belief, in the Atlantic Charter, "that all of the nations of the world, for realistic as well as spiritual reasons, must come to abandon the use of force."

This principle has, in fact, greater support in the national policy of states under modern conditions of technology and demands for self-determination than it had in the past. The great Powers, even the super-Powers, are coming to see that the use of force in international relations to acquire territory or other national interests is likely to initiate a process leading to nuclear war, or to bog down in unwinnable guerrilla hostilities. For this reason, since the atomic age began, states have been extremely cautious in using or threatening force in situations which might result in nuclear confrontation, and when they have resorted to force or threats in international relations they have often failed to achieve their ends. This seems to have been true in half of the twenty-eight international hostilities since World War II.

In colonial or internal hostilities, force has frequently been successfully used by insurgents seeking self-determination or revisionists seeking political change, but the only successful uses of force for territorial expansion since World War II appear to have been the Indian seizure of Goa in 1961, the Chinese rectification of its boundary with India in 1962, and the Israeli occupation of Arab territory in 1949 and 1967, and these may not all prove permanent. Israel's effort to expand by force in 1956 failed because of United Nations intervention. Contrary to the League Covenant and the Kellogg Pact, and also to the Atlantic Charter which, however, was signed only by the United States and the United Kingdom, World War II actually resulted in some territorial gains by the victorious Allies, especially by the Soviet Union in the Baltics, in Poland and in north Japanese islands, and by Poland in Germany. Since these acquisitions, the great Powers have not gained territory by war, although they have used force to establish or maintain spheres of interest, as did the Soviet Union in Eastern Europe and the United States in the Caribbean and in East and Southeast Asia. The Soviet Union, however, failed to bring Greece, Finland and West Berlin into its sphere, and the United States interventions in Cuba, Santa Domingo, and Viet-Nam can hardly be called successful.

The United Nations successfully utilized force to maintain the cease-fire line in Korea, to prevent intervention in the Congo and Cyprus, and to maintain order in Kashmir and for a time in the Middle East. States

have successfully used force for defense, as did Malaysia against Indonesia and Ethiopia against Somalia in 1963. Apart, however, from uses of force expressly permitted by the United Nations Charter, including action within a state's domestic jurisdiction initiated by the government, insurgents, or revolutionaries; action in defense against armed attack; and preventive or enforcement measures under authority of the United Nations, it appears that the use of force to acquire territory or other political advantage has been generally considered inexpedient because of the danger of nuclear war or the probability of failure especially if the action is likely to be resisted by guerrillas. Since the Dutch failure in Indonesia, and the French failure in Indochina and Algeria, colonial Powers except Portugal have abandoned empire peacefully and have avoided confrontation of nuclear Powers. Mutual deterrence has succeeded in preventing nuclear war during the first quarter-century of the atomic age.

Israel appears to be the principal state that still believes force, whether by maintaining an occupation or compelling signature of a treaty by such occupation, can be a successful means for acquiring territory, although the Soviet Union, the United States and perhaps China seem to believe that force can be successfully employed to maintain their spheres of interest or other policies.

The problem of outlawing war as an instrument of national policy by combining conviction of its illegality with conviction of its non-utility has not been solved because governments act from habit rather than reason. However irrational and illegal, the super-Powers and some others have continued to use force in international relations unilaterally when they have considered it in their national interests. It has frequently been predicted that, if this habit continues, general nuclear war will occur before the year 2000. Such predictions might be falsified by respect for international law supported by general and complete disarmament and development of the United Nations to perform necessary policing and law enforcement in international relations, as suggested in the McCloy-Zorin agreement of 1961.

United Nations insistence in the Middle East crisis that territory cannot be acquired by war would constitute an important step toward such a change in the dangerous system of "power politics" and towards "saving succeeding generations from the scourge of war." It is to be hoped that the governments of the great Powers and world public opinion will appreciate the importance of full implementation of the Security Council resolution.

It is a pleasure to note that Secretary of State Rogers accepted this position in his address of December 9, 1969. He discussed the issues concerning "peace, security, withdrawal, and territory," and said

We support this part of the resolution, including withdrawal, just as we do its other elements. . . .

We believe that while recognized political boundaries must be established, and agreed upon by the parties, any changes in the pre-existing lines should not reflect the weight of conquest and should be confined to insubstantial alterations required for mutual security. We do not support expansionism. We believe troops must be with-

drawn as the resolution provides. We support Israel's security and the security of the Arab states as well. We are for a lasting peace that requires security for both.

Israel rejected this proposal, as indeed did Egypt and the Soviet Union, but these initial reactions, probably manifesting suspicion by both sides of American intentions, may yield to second thoughts. The Arab governments seem to want peace in spite of the belligerency of Arab opinion stirred up by their own past propaganda and the present propaganda of the "Palestine Liberation Front." Israel seems to be concerned by the loss of sympathy for its cause in much of the world, by the Arab raids from the occupied and surrounding Arab territories stimulated by the Palestine Liberation Front, which is committed to a restoration of the unity of Palestine and elimination of Israel. Israel is understandably worried by the growing influence of the "Palestinians" not only among the Arab peoples in Israel, in the occupied territories, and in the refugee camps, but also within the Arab states bringing pressure on the Arab governments to abandon their commitments to implement the Security Council resolution. It is to be hoped that these developments may persuade Israel that peace in the area is in its interest, as well as in the interest of the Arabs and the world, and may induce modifications of its policy in conformity with that resolution.

Since writing this I have read the illuminating article by Nahum Goldmann, President of the World Jewish Congress, in the April issue of *Foreign Affairs*. He was one of the early Zionists, President of the World Zionist Organization and representative of the Jewish Agency before the League of Nations in the mandate period. He was a vigorous advocate of partition and gained the consent of Dean Acheson, U. S. Under Secretary of State, and President Truman to this policy in 1947. Mr. Goldmann now doubts whether time is on the side of Israel. He writes:

The hope to impose peace on the Arab world, either by pressure of the big powers or by another Israel victory, is more than slim. History proves that an imposed peace does not last long, even if a defeated people is forced for a certain time to accept a truce extracted by arms.

The long-run survival of both Israel and Judaism, he is convinced, requires that Israel establish friendly relations with the Arabs and continue as the focus of world Judaism. To achieve this he recommends neutralization of Israel under United Nations guarantee within limited boundaries, doing away with "one of the major and understandable fears of the Arab world, namely the worry about possible Israeli expansion on the one hand and, on the other, the obstacle which Israel by its geographic position represents to the ideal of a united policy for the Arab world."

If such counsels prevail, there may indeed be a possibility of peace in this most dangerous part of the world, as well as hopes for realization of a basic principle of the new international law. It is regrettable that the Government of Israel vetoed Mr. Goldmann's proposed talks with President Nasser of Egypt.

Chairman ROGER FISHER thanked Professor Wright and called upon Professor Robert W. Tucker, of the Johns Hopkins University, to address his questions to either or both of the principal speakers.

Professor TUCKER commented that the heart of both presentations related to the Security Council Resolution of November 22nd. Although the speakers disagreed in many important respects, each agreed that the November 22nd Resolution was clear. Mr. Rostow referred to a sharply defined legal framework; Professor Wright said that paragraph 1 of the Resolution was "clear" and assumed that Israel was unconditionally required to leave the territories occupied in the June 1967 war. Rostow assumed that the intent of the Resolution is that Israeli withdrawal should occur only after a general agreement has been reached. These are diametrically opposed interpretations of the November 22nd Resolution.

Professor Rostow replied that there was not so much difference between himself and Professor Wright in interpreting the resolution apart from two questions: (1) whether it required withdrawal before negotiations; and (2) whether it required withdrawal from "all" occupied territories. But Professor Wright approved the speech by Secretary of State Rogers on December 9, 1969, which was based on an earlier speech by President Johnson in 1968. Rogers' speech confirms Rostow's view of the resolution, not Professor Wright's! Both the President and Rogers had said that agreement should precede withdrawal, and that changes in boundaries can occur but should be minimal, must be justified by security reasons, and must be reached by agreement. President Johnson declared that the United States was opposed to barbed wire in Jerusalem. Professor Wright conceded that the resolution was a proper framework for an agreement. However, in developing his theory of territorial change, Professor Wright goes too far in his view that no political or territorial changes can come about as the result of war. There is no real debate over whether Israel should withdraw before an agreement is made. The question is how to reach a package settlement in the area, and what it must include.

Professor WRIGHT commented that, by the Kellogg-Briand Pact of 1928, which was the basis of the Nuremberg conception of "crimes against peace," the parties expressly "renounced war as an instrument of national policy." There could be no acquisition of territory by force. The preamble of the November 22 Resolution affirmed that such a use of force is illegal under international law. The right of self-defense does not embrace the acquisition of territory. One cannot say that negotiations over territory are fair when one or the other party occupies most of it. The Resolution of November 22nd is advantageous to Israel in requiring withdrawal only from territory occupied in 1967. The territory occupied by Israel under the 1949 Armistice beyond the U.N. partition line of 1947 might have been added. A reasonably fair solution would be Israeli withdrawal in accord with the United Nations resolution and occupation of the area, not by Arabs, but by a United Nations force until permanent boundaries are negotiated.

Professor TUCKER said that he had tried to elicit a concession from Professor Rostow and Professor Wright that the intention of the resolution



was not to point to either side. Rather, the resolution is a package deal. But the question is: Does not the resolution not resolve, but merely reflect the results of the war?

Professor ROSTOW agreed, but noted that it has thus far been impossible to get the Government of the U.A.R. to agree to procedures for settlement. The United Arab Republic has refused to agree to any procedures for making an agreement.

Professor WRIGHT again questioned whether negotiations under the present conditions would be fair to the United Arab Republic, and noted Secretary Rogers' statement that a settlement should not "reflect the weight of conquest."

Professor ROSTOW said that the theory of the resolution—agreement before withdrawal—was perfectly fair because Egypt had broken the agreements of 1957.

Chairman FISHER observed that paragraph 3 of the November 22nd Resolution requests the Secretary General to designate a special representative "to promote agreement" and assist efforts to achieve an "accepted settlement." Professor ROSTOW read this language as a commitment to reach an agreement.

Professor TUCKER raised a subsidiary question. If we assume a status of belligerency and that Israel is an occupying Power in the territories acquired in the 1967 war, what are Israel's obligations as an occupant Power and has Israel conformed to the 1949 Geneva Conventions and earlier Hague Rules?

Professor ROSTOW responded that he had not studied these questions in detail. The United States insists in general that Israel is an occupant Power and must conduct administration at the municipal level. Israel agrees. Although he is not an expert on the conventions, Professor ROSTOW expressed the view that in Jerusalem these requirements have been met. This was the reason why we had repeatedly refused to support the Security Council resolutions on Jerusalem.

Professor WRIGHT noted that under the Hague Rules a military occupant can maintain order in the occupied territory and ensure the security of its forces. However, the occupant should apply existing law using local officials. This was not the case in Jerusalem. The Law of June 27th and other regulations exceeded the powers of an occupant. Prominent Israeli officials have said that they plan to annex the territory. There can be no doubt regarding Israel's intention to extend its territorial boundaries.

Chairman FISHER called upon Professor John J. Barceló III, of the Cornell Law School, to address his questions to the speakers:

Professor BARCELÓ said he wished to return to the November 22nd Resolution, which in his view was quite ambiguous. He wondered whether Israel was to withdraw from all or part of the territory in question before negotiations. Under the United Nations Charter and the Resolution of November 22nd the acquisition of territory by war is prohibited. This derives under the Charter, as pointed out by Professor Wright, from the prohibition against the use of force in Article 2(4). But there are ex-

ceptions to the Article 2(4) principle. The most significant exception is contained in the right of self-defense under Article 51, to which Professor Rostow has referred. Article 51 conditions the right of self-defense upon the occurrence of an armed attack against the defending party. In terms of Article 51 of the Charter, what kind of armed attack occurred to justify the Israeli argument of self-defense?

Professor Rosrow replied that the United Nations Security Council is the ultimate arbiter of Article 51. There was ample basis for Israeli action under Article 51 in the closure of the Strait of Tiran and in the mobilization of Arab forces for an armed attack. Article 2(4) of the Charter is also linked with Article 51. There is no possible doubt that the closing of the Strait of Tiran breached the understandings of 1957. The entire Security Council understood this action to justify the use of force. Both the Security Council and the General Assembly refused to condemn Israel and refused to find a wrongful use of force in 1967. The United States has said that the Armistice Agreements and not the cease-fire line must be the guidepost to an agreement and that changes should be minimal. The Security Council has unanimously agreed that the November 22nd Resolution is compatible with the principle of international law proscribing the use of force to acquire or annex territory.

Professor WRIGHT cautioned that the question of the acquisition of territory by force was not the same as identifying an aggressor. He agreed that the closure of the Strait of Tiran by the United Arab Republic was an illegal act, but Israel made the first armed attack. If Israel merely wanted to defend itself, it should have allowed the United Nations Force to come to its side of the boundary, as suggested by U Thant. There is a great deal of evidence that Israel desired more territory.

Professor BARCELÓ asked Professor Rostow whether it was his view that the United Arab Republic had failed to accept the November 22nd Resolution by being unwilling to negotiate before an Israeli withdrawal from the occupied territory?

Professor ROSTOW responded that was correct.

Professor BARCELÓ asked Professor Wright whether it was his view that acceptance of the resolution by the Israelis would mean that they must withdraw to some extent prior to the opening of negotiations on permanent boundaries.

Professor WRIGHT reiterated that it would be an unfair negotiation if Israel occupies territory she wants to keep, such as Golan Heights, Jerusalem, the Gaza Strip, etc. If these possessions are held, how can boundaries be negotiated?

Professor ROSTOW cautioned against relying on what is said in the newspapers about retaining territory.

Professor BARCELÓ wondered whether Israel could make a claim to certain territories, such as the Sinai Peninsula or Golan Heights, which were not a part of the 1947 United Nations Partition Plan.

Professor ROSTOW said that there must be a better guarantee of Israeli

maritime rights than before. However, there had been no negotiations on this subject and it has been impossible to get a clear statement from the U.A.R. He suggested one possible solution would be completely to demilitarize the Sinai Peninsula; the area in question might be policed by joint Israeli-U.A.R. patrols. Another possibility would be a long-term lease of Sharm-el-Sheikh. Golan Heights is a fundamental security issue, but Syria refuses to accept the November 22nd resolution.

Professor WRIGHT agreed on the need for adequate guarantees of navigation rights. He thought that rumors of the discovery of oil in the Sinai may pose real difficulty to an Israeli withdrawal from the area. If a United Nations force occupied the Sinai, replacing Israeli forces, there might be an arbitration of some kind on the necessity of Israel's retaining some or all of that area.

Professor BARCELÓ asked whether, in light of its previous experience with the withdrawal of the United Nations Force prior to the 1967 war, Israel would be justified in turning territory over to the United Nations.

Professor WRIGHT thought that a permanent boundary should have been negotiated in 1949.

Professor BARCELÓ inquired about the mandate of the United Nations Force proposed by Professor Wright. What should the Force do if, for example, there were commando raids against Israel by Palestinian Arabs?

Professor WRIGHT said the mandate of the United Nations Force should be to keep order in the territory and to prevent raids from the other side.

Professor BARCELÓ wondered whether, in the event of a raid against the United Nations Force by Arab states or Palestinian commandos, the U.N. Force should be permitted to use force and to what extent.

Professor WRIGHT said the U.N. mandate should be the same as in the Congo and Cyprus. The continued presence of the Force must be at the discretion of the United Nations, not of the state where located, as was the force on the Egyptian border under the 1949 Armistice.

Chairman FISHER thanked the panelists, and asked for remarks from the floor.

Professor MARTIN DOMKE commented that, if he understood correctly, Professor Wright was proposing that the United Nations Security Council impose compulsory arbitration on both parties. Yet, it is well known that compulsory arbitration is abhorrent in all quarters of the world. While this proposal may be morally and psychologically justified, where is the legal basis for such authority of the Security Council? Article 33 of the Charter permits the Security Council to appeal to parties, not to impose.

Professor WRIGHT conceded that such authority did not exist under Article 33, but it might be derived from Article 39 of the Charter, which authorized the Security Council to *decide* on measures to restore international peace and security in case of breach of the peace. There was a precedent under the 1924 Treaty of Lausanne, which gave the League Council, which had only recommendatory powers under the Covenant, the authority to *decide* the Mosul dispute between Turkey and Great Britain

as Mandatory of Iraq, if the parties had not reached a settlement within a year. The parties did not reach a settlement, the decision was made by the League, and Turkey acquiesced in the settlement.

Professor VERNON FERWERDA asked about the present status of the nationality of the Palestinian Arabs?

Professor Rostow said that the United States regards the Palestinian Arabs as Jordanian citizens or as citizens of the other appropriate Arab countries. This has been an admittedly simplistic but nonetheless adequate working answer. However, the question has been much discussed. There has been no international legal recognition of a Palestinian personality or nationality as a separate legal concept; the issue has been treated as a political problem.

Professor WRIGHT agreed with Professor Rostow. The Palestine Liberation Front believes that Palestine is still a state as it was under the Mandate; that partition was illegal; and that inhabitants of the area are Palestinian nationals. This is not a reasonable position. The Arabs provisionally recognized Israel within the U.N. partition boundaries in the Lausanne Conference of 1949. In any case the inhabitants of Palestine outside of Israel would continue as Palestinian nationals as they were under the Mandate and, apart from the internationalized area of Jerusalem, under the partition resolution of 1947.

Professor RUTH C. LAWSON suggested that if we are truly seeking a resolution of the conflict, we are only now beginning to identify the actual parties. The Palestinian Arabs and Israel are the true parties in the confrontation. Urging that the actual protagonists in the conflict be considered, she asked whether there is then a legal approach to this problem, or is it not essentially political?

Professor Rostow commented that while there was great concern, which he shared, for the autonomy and political future of the Palestinians, thus far the legal approach has been through Jordan and Israel as the only states in the old Palestine area. But the basic party in interest is the Soviet Union. The Palestinian Arabs are a secondary factor in comparison, and the position of the United Arab Republic was impossible without Soviet support.

Mr. FRANK SAKRAN declared the question of the refugees is the basic issue, not the U.S.S.R., which came to the conflict seven years after the refugee question arose. In 1967 there were 1,350,000 refugees. The 1967 war was caused by their infiltrating into Israel, which retaliated. Refugees have rights. What is to be done with them? It is now clear that we cannot continue to ignore them and still hope for peace.

Professor WRIGHT responded that the refugees should be permitted to return to their homes in Israel or be compensated.

Professor Rostow concurred that the refugees are a tragic problem, all too easily ignored. The position of the United States is based on three propositions. First, a large number of opportunities for emigration must be found. Second, the number of refugees Israel would accept should be determined. Third, each individual refugee should be able to opt secretly

for himself among the alternatives. Professor Rostow believed the U. S. position to be sensible and wise, and that Israel would support such a position.

Judge ABRAHAM J. MULTER noted that implicit in the question previously posed by Professor Barceló is the fact that a United Nations Force would not be a police force or appropriately armed. Even had Israel accepted such a force, it would not have stopped the closing of the Strait, which was an act of war. Until the United Nations has a true police force, it can only report violations after their occurrence. With respect to refugees, more than 600,000 from Arab states have already been assimilated into Israel. Judge MULTER pointed out that Israel was willing to negotiate prior to 1967 without asking the Arabs to leave Gaza, Golan Heights, and Jerusalem—taken in 1948 by force of arms. Statements of Israeli officials concerning the future of Jerusalem must be viewed as political statements and, therefore, are not preclusive of discussion. Everything is negotiable, and Judge MULTER believed these facts demolished the argument of Professor Wright that Israel intended to keep the territory occupied in 1967.

Ambassador Abdullah EL-ERIAN did not deem it necessary to take up the political questions raised by Professor Rostow. Inasmuch as this was a legal forum discussing the legal aspects of the search for peace in the Middle East, Mr. EL-ERIAN wished to comment briefly on a few legal points raised by the speaker. First, the question of aggression. Article 51 of the Charter was clear in outlawing the use of force except in the case of self-defense against armed attack. Self-defense cannot therefore be resorted to to justify armed aggression against a state for placing restrictions in its own territorial waters. The second point relates to the interpretation given by Professor Rostow to the provision in Security Council Resolution 242 which calls upon Israel to withdraw its forces from Arab territories which it occupied in June, 1967. Legal instruments cannot be interpreted on the basis of a whim of one delegation to delete the word "the" from the English text. It appears in the French, Spanish, and Russian texts which are equally authentic. Moreover, it should be interpreted in conjunction with the basic principle explicitly reaffirmed in the first paragraph of the resolution; namely, the inadmissibility of the acquisition of territory by war. All the previous draft resolutions on the problem, whether before the Security Council or the General Assembly—which constitute the "actes préparatoires" of Security Council Resolution 242—have in common the provision for withdrawal from all the territories.

As to the question of direct negotiations, one must keep in mind the legal nature of the problem. It is an international situation resulting from armed aggression, and it is the responsibility of the United Nations to put an end to that aggression which is a violation of its Charter and the basic norms of contemporary international law. Negotiation under the threat of such aggression is a case of duress which vitiates the consent. Professor Rostow is no doubt aware of the relevant provisions on duress in the Vienna Convention on the Law of Treaties.

Professor Rostow replied that his interpretation of the meaning of the

word "the" was not a semantic argument, but was based upon the full context of the facts and the history of the resolution. While the translation system may have been faulty, the debate over the draft was very real, and the interpretation was not the whim of an eccentric member. With respect to negotiations, dozens of formats have been pursued without success. Mr. El Erian also neglected to mention the fate of the assurances given in 1957, nor, of course, did the Ambassador deny his statement about the U.A.R. responsibility for the paralysis of the Jarring mission. Professor Rosrow pointed out that effective negotiations have taken place on numerous occasions when the territory of one of the parties was occupied—Germany, Poland, and others. As for the duress clause of the Vienna Convention, it is fantastic to suppose this provision invalidates every peace treaty now in force. International law simply cannot accept such an interpretation.

Professor JOHN NORTON MOORE commented that appraisal of the reasonableness of the negotiating positions of the two sides may be one of the most meaningful approaches to assessment of their fulfillment of Charter obligations. The obligation under Article 33 of the Charter to seek a solution of disputes by pacific means provides a basis for community appraisal which has too often been neglected. Along these lines, Professor Wright's point concerning possible unfairness to the Arab states of continued Israeli occupation of the occupied territory during negotiations has some validity. It is important to point out, however, that Israeli withdrawal prior to negotiations might also involve elements of unfairness to Israel, particularly if attacks from Arab guerrilla groups were to continue. Thus, if Israel withdrew and the guerrilla groups refused to negotiate, Israel might be badly prejudiced. On the other hand, if Israel enters into a settlement calling for a pullback from the occupied areas and then refuses to pull back, the Arab states may be in about the same position as they are at present. Whatever the answer to the specific issue of timing in the Middle Eastern negotiations, it is important that the negotiating positions of contending factions become an important part of the appraisal of their Charter obligations.

Professor WRIGHT reiterated that for a fair negotiation the United Nations should occupy the territory in dispute and the occupation should be sufficiently effective to prevent raids.

Mr. GEORGE OBIOZOR of Biafra said that the international community was afraid to face the situation in the Middle East and questioned whether the United Nations has ever been effective. Israel is not relying on expansionism, but is struggling for existence. The issue of the refugees, which receives so much attention in the Middle East, was ignored in Biafra, where there were many more. We must tell the Arabs to accept the existence of Israel.

Ambassador DANIEL Y. T. LEW asked whether there were any legal impediments to the neutralization of Israel as proposed by Mr. Nahum Goldmann in the current issue of *Foreign Affairs*.

Professor WRIGHT replied that he knew of no legal impediments and noted that neutralization has been effective in the case of Switzerland.

Professor Rostow concurred that there were no legal impediments, but cautioned that the United Nations was weak as an enforcing agency. However, the United States might guarantee a settlement under the Resolution of November 22nd for all the parties. The possibility of a guarantee has much merit and may be the most feasible way forward. This would also reduce the burden of armaments on all the countries.

Mr. I. NAKHLEH paid tribute to Professor Wright for dealing with the legal rights of the parties, whereas Professor Rostow had treated only the political aspects. He suggested that the United States should take pride in its rôle in creating the rule in international affairs that conquest cannot establish a right of sovereignty. The existence of Israel is contrary to international law and justice. Great Britain had no right to promise a home in Palestine and no right to expel the indigenous population. The doctrine of non-recognition is applicable here. The Palestinians want peace on the basis of justice.

Professor S. P. SINHA said that Professor Rostow appeared to suggest an Arab-Soviet territorial expansion in the area. What evidence was there for such a statement?

Professor Rostow responded that there was a great deal of evidence. He would mention only the presence of 70,000 U.A.R. troops in Yemen not long ago, the pattern of infiltration into Israel, the outside exploitation of Arab politics to weaken existing systems and encourage other forces, Soviet penetration into the Red Sea area, and recent political changes in Libya and Algeria.

Mr. MUHAMMAD MUGHRABY raised two questions: First, how would the application of the principle of self-determination to the Palestinian Arabs help to achieve a peaceful settlement of the conflict? Second, what rights of action in self-defense would the denial of self-determination give to the Palestinian Arabs?

Professor Rostow, returning momentarily to Professor Sinha's question, also wanted to mention the circulation in Arab countries of false intelligence reports in 1967 that Israel was mobilizing against Syria. These reports are known to have been false, and President Nasser has cited their importance. The provisions of the November 22nd Resolution can be satisfied through a series of agreements. The important element is that there be a choice of alternatives for repatriation, a human choice. Jerusalem has not been annexed, but is being administered at the municipal level. The complex question of citizenship is being considered at this time by governments. Everyone is flexible, and perhaps a unique legal solution may be developed.

Quoting the maxim that "rights do not arise from wrongs," Professor WRIGHT cautioned that rights may arise from long established facts. While he agreed with the Palestinian view that it is difficult to reconcile Article 80 of the Charter with the U.N. partition resolution, partition was nevertheless voted. Israel came into existence and has been recognized by the great Powers. That is an established fact. With regard to self-determination, it might be worth thinking about implementing the parti-

tion resolution and creating an Arab Palestine state in close economic relations with Israel.

Mr. MICHAEL P. PERSICO asked whether it was possible that a third state was the key to peace in the Middle East. Referring to Sino-Soviet enmity and the efforts of Communist China to push south into Asia as well as attempting to gain a sphere of influence in the Middle East, Mr. PERSICO wondered whether the U.S.S.R. was not seeking to forestall Chinese influence and feared that its own influence would fade if a settlement in the Middle East were reached?

Professor ROSTOW agreed that this thesis was plausible. Chinese influence was a factor.

Dr. S. BHATT asked whether the Portuguese conquest of Goa had given it prescriptive title?

Professor WRIGHT replied that Portuguese occupation of Goa for more than 400 years was a fact which had been generally recognized to give it title.

Dr. BHATT wondered if occupation of territory based on conquest was valid under modern international law?

Professor WRIGHT noted that acquisition of title by conquest was permissible when Portugal conquered Goa, but it was not now under the Kellogg Pact and the Charter.

Mr. BENJAMIN M. BECKER commented that if Israel today returned the territory occupied in 1967, what or who will assure the security of Israel? The Arab countries will not. Arab heads of state have spoken repeatedly of destroying Israel in a sea of blood; France has even refused to honor its contracts with Israel; Great Britain has largely withdrawn from the Middle East. The United States is committed elsewhere and is not about to get involved elsewhere; the U.S.S.R. certainly would not do so; and no justice can be expected from the U.N. Security Council with one third of its Members not even recognizing the state of Israel.

Professor WRIGHT declared that Israel cannot maintain its security by the use of force. There must be another way. The United States and the U.S.S.R. must get together to find a solution. The Soviet Union may not want a permanent war in the Middle East, and it may be possible to cooperate in guaranteeing the provisions of the resolution. If the area in dispute were occupied by a United Nations Force, a settlement and guarantees might be negotiated.

Professor ROSTOW asked Professor Wright why he assumed that Israel had an appetite for expansion. How could this view be reconciled with the Israeli message in 1967 to Jordan saying there would be no attack if Jordan remained at peace? Surely if Israel had territorial aspirations, the old city of Jerusalem headed the list.

Professor WRIGHT responded that Israel gained by force 50% more territory in 1949 than was provided in the partition resolution of 1947. It withdrew from territory occupied in 1956 only under pressure of the United Nations supported by the United States and the Soviet Union. Israel statesmen have insisted on retention of some of the territory occupied



in 1967. In view of the projected population growth of Israel, it is not unreasonable to assume, as the Arabs do, that it will demand more territory in the future, as it has in the past, unless permanent boundaries are established and guaranteed.

Chairman FISHER thanked the guests and participants for their contributions and adjourned the meeting at 11:00 o'clock p.m.

### The United Nations System and Financing Transnational Investment

The session convened at 8:15 o'clock p.m. in the Astor Gallery of the Waldorf-Astoria Hotel. Professor Covey T. Oliver of the University of Pennsylvania Law School presided.

Chairman OLIVER. The purpose of the panel is not to focus on values but on the practical aspects of transnational investment. Private sector investment is more resilient than many assume. The rôle of the lawyer is not only to find money and pick a capital structure, but also to accommodate the sharing claims of the host country. The basic question is how do we get the money when the client corporation does not plan to use its own resources? In many ways the search is as technical as the search for the correct form of action in the old common law actions—artificial distinctions but important ones. The search game must be played in accordance with available sources and applicable legal structures.

### BLENDING PUBLIC AND PRIVATE CAPITAL

*By R. B. J. Richards \**

I am most appreciative of the opportunity of participating in this program since the subject for discussion is one of particular interest to us in the World Bank Group.

No doubt you are broadly familiar with the operations of the World Bank and its affiliates, the International Development Association and the International Finance Corporation, and I do not plan to dwell upon the wide developmental activities of the Group, interesting as they are. As practitioners, you will be interested in the private sector and in what the Group can do for you and your clients who are engaged in business, industry and banking.

The International Finance Corporation is the World Bank Group's special arm for private enterprise; it is the only international institution devoted to assisting the private sector. IFC's distinguishing characteristic is that it can invest its funds in any form, including share capital (or "equity"); it can provide working capital and finance local expenditures; and its funds are not tied. It is designed to be completely flexible. In accomplishing economic objectives, IFC operates very much as does any investment banker, except that it works with, and does not compete with, private capital.

\* General Counsel, International Finance Corporation.

IFC's funds are relatively limited. It has about \$107 million of share capital paid in by its 93 member countries and about \$56 million of earnings in reserve. This \$163 million is available for equity investment. Also, IFC is empowered to borrow from the World Bank, for purposes of re-lending, an amount equal to four times its paid-in capital and surplus; of this, a line of credit of \$200 million has been established.

In the last fiscal year ended June 30, 1969, IFC's commitments aggregated about \$93 million and I expect that they will be more this year. Such a rate of commitment upon so small a capital base has been possible because IFC has been successful in revolving its portfolio by sales to, and participation arrangements with, private investors. Last year IFC recovered 44% of the funds it committed, by sales to private institutional investors.

Of course, IFC is mainly of interest as a source of funds, especially since it can fit in anywhere into a financial plan; but IFC does rather more.

IFC has five prominent investment bankers as a panel of advisers and one of them refers to IFC as the "catalyst-umbrella." By this he points up two basic functions:

First, to promote economically useful and profitable enterprises, to bring together investment opportunities and private capital and management; and generally to stimulate and help create conditions conducive to the flow of private capital.

Second, to act in its rôle as a public international institution so as to help create conditions of confidence in which ventures may be undertaken and money flow to the developing countries. If IFC assists a venture in any country, that country is a member of IFC represented on IFC's Board with the other member countries, so IFC can be expected to have a special relationship which may assist the blending of the interests involved.

IFC does many things. It engages in direct financing operations, usually on a mixed loan and equity basis, and in underwriting and stand-by arrangements designed to assist local capital markets. It works with, and helps finance, local development finance companies and other institutions which are themselves engaged in assisting private enterprises. It advises member countries on measures that will assist private investment; and, importantly, it seeks to develop in the capital-exporting countries an interest in long-term investment in the developing countries. All this is postulated upon the premise that investment in the developing countries can be expected to occur only if ventures are intrinsically sound and there are fair prospects of profitability.

Generally, IFC will only assist ventures in which there is provision for participation by local private investors, and the typical enterprise in which IFC is interested is a joint venture involving a marriage of local experience and foreign "know-how."

It might be useful to give an example of what I am talking about. Let us take a fertilizer or petrochemical venture in a developing country which may cost (say) \$70 million, allowing for interest during construction and permanent working capital on completion. The foreign exchange com-

ponent is likely to be about \$40 million, with the balance in local currency; this balance might be increased, depending on requirements for customs and port handling.

All major projects may involve sensitive issues of government policy; such as whether the project should be in the public or private sector; perhaps which of competing projects should proceed; and there may be delicate questions of pricing and tariffs. The position of government must be considered and, of course, governmental help in the form of tax holidays and other incentives can be vital.

The venture may be a direct promotion by IFC so that IFC puts the transaction together, or it may be sponsored by a local group or a foreign group.

We would expect there to be a local partner, able to provide knowledge of market conditions and able to handle relations with government and local interests, working with a foreign partner able to contribute technical and managerial expertise; and we would expect each of these partners to have a meaningful equity stake in the venture.

IFC would carefully evaluate the proposal in all its aspects and let us suppose that all the intrinsics check out. There remains the problem of finding loan and equity capital, of which \$40 million is needed in foreign exchange. It would be normal to provide as much leverage as is prudent for the equity in the business. Let us therefore assume a debt-equity ratio of 60:40, which is conservative but not unduly so. That is to say, the equivalent of \$42 million is to be in loan form and \$28 million equivalent in the form of equity.

First, the sources of equity capital must be identified. The local partners and the foreign partners should take a substantial proportion; at least 25% each. On this basis, the foreign partner would put in \$7 million in foreign exchange and the local partner would put in the equivalent in local currency. The balance of the equity might be found from a number of sources, perhaps up to 25% from an agency of the host government. IFC, of course, is a natural participant for, say, 25%, and this money provided by IFC will be in foreign exchange. There might be other sources of equity capital. In some countries it may be possible to raise capital from the public, with underwriting by local institutions in which IFC might also join. If equity is not raised from a local development institution then, dependent on the region, there are other institutions which can provide equity; such as ADELA in Latin America, or PICA in Asia, or IFC might interest specialist institutions interested in the type of business or the locality. IFC has had very good experience with the Edge Act companies in this connection.

There still remains the problem of providing a substantial amount of loan capital and a good deal of this must be in the form of foreign exchange (\$26 million on the basis I have described). Naturally, everyone would prefer this to be long-term and at the lowest possible rate. If U. S. procurement is involved, the most natural source of funds would be Export-Import Bank or AID. AID might also be in a position to lend local cur-

rency; and perhaps dollars might be lent by U. S. institutions with an AID guarantee. Dependent upon procurement, long-term funds might come from other countries which have similar institutions. Untied long-term loan capital in foreign exchange may be available from various sources; for example, the World Bank, in cases where a government guarantee is forthcoming, or from IFC in cases where a government guarantee is not forthcoming. In many places there are regional or local development banks which can provide long-term loans in foreign exchange with funds which they themselves have derived from international sources, including the World Bank and IFC. In Latin America there is the Inter-American Development Bank; and in Asia, the Asian Development Bank. In some territories, the European Investment Bank may participate. Depending upon location, particular financing groups may be induced to invest, perhaps through participation in an IFC investment. And, finally, to the extent that long-term funds are not available on suitable terms, suppliers' credits may be arranged for part of the financing.

I hope that this gives some idea of how public and private capital resources can work together.

In these times of tight money, it would not be true to say that there is no difficulty in raising capital, but it would be true to say that few economically justified and worthwhile ventures fail to obtain financing.

Of course, I have depicted a very straightforward financial plan and some financial engineering may be necessary so as to provide an appropriate sharing of risks and rewards. For example, to provide greater security for the senior debt and to provide greater leverage for the capital stock, a portion of the loan capital, carrying a higher rate of interest and perhaps payable only if earned, might be subordinated in terms of priority and be retired through the operation of an earnings sinking fund. The equity holders may prefer to provide some capital in this form so that they can recover it otherwise than through taxable dividends payable out of taxed profits. Some debt may carry a lower coupon and an option or conversion feature. Need and resourcefulness will indicate many permutations.

Since IFC's basic purpose is to get private capital moving and to revolve its own funds, IFC would always be looking for private institutional investors to share IFC's position. These institutions may come into the transaction as co-investors, or they may be participants in IFC's own investment, receiving the same terms as does IFC. In the case of the loan portion of an investment IFC would expect to hold and manage the loan and account to the participant for its pro rata share of principal and interest received. In the case of the equity portion of an investment, the participant would receive shares of capital stock of the enterprise concerned.

IFC stands ready to sell securities out of its portfolio; after an investment has begun to show its paces, the sale price would be a matter for negotiation.

In the time available I have left a lot of gaps and I have not dealt at

all with the many conflicts of laws problems that arise in the course of transactions across frontiers. However, I shall be happy to try to answer any questions that anyone may have.

## THE RÔLE OF EDGE ACT CORPORATIONS IN TRANSNATIONAL FINANCING

*By Carroll R. Wetzel \**

Until the Federal Reserve Act became law in 1913, the commercial banks<sup>1</sup> of this country played a minimal rôle in financing world trade. They could not accept drafts—the traditional device for financing such trade—nor could they open branches abroad. They were given the power in that year to do both.

Shortly it became evident that even these powers were inadequate for the purpose. In 1916 the Act was amended to permit national banks to invest 10% of capital and surplus in other corporations engaged in international banking upon defining and limiting the activities of the particular corporation by agreement with the Federal Reserve Board. Again the inadequacy of the statutory concept quickly became evident, and in 1919 the Act was further amended by a bill introduced by Senator Edge of New Jersey to authorize what have come to be known as Edge Act corporations. Federal incorporation was authorized for corporations to engage in international banking and in international finance. The 10% limit was retained; a minimum capital of \$2,000,000 was required; no investment by the Edge Act subsidiary was permitted in any corporation doing business in the United States (a restriction that was to cause troublesome regulatory problems); and limits were put on the amount the Edge Act subsidiary could invest in any one enterprise. The Federal Reserve Board was authorized to administer the Act and to issue regulations under it.

Two rights, alien to the banking pattern of the country, were given to Edge Act corporations: first, the right to make equity investments; second, the right to have offices across State lines. Essentially this meant the right of non-New York City banks to have, or rather the right of their Edge Act subsidiaries to have, offices in New York City, the principal center, then and now, of international banking and finance in the United States.

Since 1919 the only change in the statutory scheme occurred in the 1960's, when direct foreign branches of banks were given broader powers and banks were authorized to acquire directly shares in foreign banks.

\* Of the Pennsylvania Bar.

<sup>1</sup> An exact delineation of the rôles of national banks and of State banks is not possible in this short paper. The powers of national banks and of State banks that are members of the Federal Reserve System are enough alike today to permit a disregard of the distinctions for present purposes.

So today it can broadly be said that Edge Act subsidiaries can do only two things that the parent banks cannot do directly: (1) make equity investments overseas in non-banks; (2) have a New York office.

Against this brief sketch of the background, what rôle are Edge Act corporations playing today? About 65 such companies are owned by about 45 banks. Their aggregate capital accounts are about \$500 million; aggregate assets, \$3.2 billion; aggregate deposits, \$2.4 billion. Their aggregate equity investments are \$280 million and a fairly reasonable estimate of their medium to long-term loans would be not more than another \$230 million.<sup>2</sup>

Aggregate funds employed in financing, *i.e.*, equity investments and medium to long-term loans, as distinguished from traditional short-term bank credits, would thus seem to be slightly over \$500 million or, stated another way, slightly over aggregate capital accounts. Even if all loans and acceptances were medium to long-term, the total would be only \$1.1 billion. To put this in perspective, the total foreign investment of United States business is estimated at \$146 billion. Quantitatively, therefore, the contribution of Edge Act corporations to foreign financing is negligible. Indeed, the contribution of the entire banking system is relatively small. It is probably about \$5 billion.<sup>3</sup>

It must be emphasized that this is a quantitative estimate. Qualitatively, the contribution is more significant than these figures indicate. A small loan or equity investment can often be the key to a significant transaction.

The probable reasons for the relatively modest rôle of Edge Act corporations in overseas finance can be identified, at least in broad outline. It has already been pointed out that such corporations have only two powers not held by parent banks: to make equity investments in non-banking enterprises and to have an office in New York City. It has also been pointed out that the aggregate investment of the entire banking system in medium to long-term overseas financing is probably about ten times that of all Edge Act subsidiaries. There must be a correlation between these two facts. The area of activity available to the subsidiary but not to the parent bank is not great and is appealing only to large banks.

This raises two questions: Which are the banks that have such subsidiaries and why do they have them? A brief listing of the principal activities of such subsidiaries may be helpful.

Banks are increasingly interested in expanding into financial areas heretofore seldom or not at all associated with traditional commercial banking. Finance companies and mortgage servicing companies are illustrative. Not surprisingly, such interest extends abroad as well as at home, and so Edge Act subsidiaries are acquiring interests in financially related in-

<sup>2</sup> This figure is based on an estimate that a maximum of one third of known loans and acceptances of \$820 million represents medium to long-term financing.

<sup>3</sup> Of the \$24 billion of deposits in foreign branches, \$14 billion has been brought home to help hard-pressed head offices. One third of the balance may be in medium to long term-loans and, in addition, the total of such loans from home offices is about \$1.5 billion.

stitutions abroad that under present rules cannot be acquired directly by the parent banks.

Another area of interest is in the so-called project investment. These may be totally unrelated to finance and are made simply to realize a profit. Since the direct profit, or at least a direct profit commensurate with the risk, is sometimes hard to see, emphasis is often put on the collateral benefits to the parent bank. Broadening contacts lead hopefully to increased deposits, as does getting in on the ground floor of a developing situation or area. Only the very largest banks can go it alone in this business and so, not surprisingly, some banks restrict this type of investment to participations in loans developed by the International Finance Corporation which does virtually all the time-consuming and expensive analytical and legal work.

Less tangible but nonetheless perhaps real benefits are derived by some from using the subsidiary as an adjunct of the parent bank's international department or as a frank attempt to improve the bank's competitive image with domestic customers.

Often, perhaps usually, a mix of all these factors is present to one degree or another.

It is not surprising that of the more than 13,000 banks in the United States only about 45 have a financial stake in Edge Act corporations. Relatively few banks are large enough to spread into non-traditional financial areas domestically, let alone abroad. As for project investments, there are plenty of "projects" at home that need banking help and offer alternatives for the banker's dollar, particularly in a time of tight credit such as today. Unless a bank is large enough to eye the foreign market as a source of deposits, perhaps it is permissible to question whether the bank will profit from looking overseas for investments.

There is another difficulty: How does the banker eventually realize on the equity investment in a project abroad? By definition the investment is probably not liquid. Puts—contractual rights to require third parties to buy the investment on agreed terms—are perhaps the best way but they are not easy to negotiate and in any event are not always such a sure thing. Restricting such transactions to hard currencies and hoping to recover by way of dividend payouts is a policy sometimes adopted. This problem—when does the money come home?—will slow down many a banker accustomed to seeing repayment clearly programmed.

At the heart of all this, of course, is the nebulous psychological distinction between the entrepreneurial approach needed here and the traditional and proper, indeed essential, caution of the person accustomed to receiving other people's money for deposit and turning it over safely at a profit. To labor a point already made, only the largest banks can tread here and then only with a small part of their total resources.

What of the regulatory climate and problems? The problems are difficult ones and so, not surprisingly, one finds some ambivalence on the regulatory stage.

If safety of the banking system is to be the sole objective of policy,

the path should be fairly clear. The statute limits the amount that may be invested in the stock of an Edge Act subsidiary, or in all of them if a bank has more than one, to 10% of the parent bank's capital and surplus. The amount of permissible debt is controlled by the Federal Reserve Board. It can fairly be asked why this should not be the limit of regulation if safety is the criterion, although it is by no means the limit even of the statutory restrictions.

Safety of the banking system is not the sole objective of policy today, whatever the objective was in 1919. Implementation of monetary policy can be frustrated, as has already been seen, or so it is said, if the doors to the foreign market swing too freely. Moreover, when the Congress is struggling to define the proper limits, if any, of the powers of bank-related corporations, as it is today with the one-bank holding company bill, should banks have complete freedom to control totally unrelated enterprises abroad? The Federal Reserve Board says no and refuses to approve such investments. Again, to what extent should antitrust objectives weigh in the fixing of policy when extensive overseas banking relationships are being established? And how much should regulation in the securities field by the Securities and Exchange Commission limit activities of bankers abroad which are traditional for some of their foreign competitors? To what extent should foreign activities of Edge Act corporations be limited or channeled to help alleviate balance of payments problems? Should controls be used in implementing foreign aid policy as between developing and developed countries?

Some of these are hard questions and none is easy. While existing restrictions may be irksome to some, it seems fair to say that governmental agencies are proceeding with considerable restraint, if not wariness, rather or an *ad hoc* basis, in developing broad rules of permissible conduct. At times this will be frustrating to the regulated, but it is probably the best way and undoubtedly the inevitable way.

There is no time tonight during this panel discussion to explore these questions in depth. Without such exploring, suggested answers would be presumptuous. In any event this is a review of the field by a lawyer to other lawyers. Without wishing to suggest that we lawyers cannot be helpful in solving wide-ranging problems, this lawyer, at least on this occasion, will not presume to suggest answers. If there are bankers or economists or policy-makers in the audience who have valid objection to anything that has been said, it is hoped that they may be charitable.

## RESTRAINTS ON DIRECT INVESTMENT

*By Franz M. Oppenheimer \**

The balance of payments problem of *the United States* is primarily a political and psychological and not an economic problem, and the in-

\* Of the District of Columbia Bar.



herent weakness of virtually all discourse about the balance of payments is its exclusive economic orientation. In the early 60's there was no strictly economic problem at all: During the years 1960 to 1964 our average private investments abroad were slightly over \$4½ billion a year and our balance of payments deficit on the liquidity basis \$2.8 billion; and even in the year 1967, a year during which European hysteria about the American deficit reached its high point, the deficit of \$3.5 billion amounted to very substantially less than private foreign investments of \$5.7 billion.<sup>1</sup>

This meant that the deficit would almost certainly have disappeared if Americans had stopped investing abroad and invested at home instead. Moreover, until 1968 the surplus in our trade balance ran in the billions: an average of \$5.4 billion during 1960-1964 declined to about \$4 billion in 1966 and 1967 before its collapse to about \$600,000 in 1968 and 1969.<sup>2</sup> In short, until recently the United States was in the position of a rich man, with, say, an annual business income of \$200,000, after taxes, who lives on \$120,000 a year, invests another \$100,000 in solid and profitable ventures, and borrows \$20,000 a year to help finance his investments.

It is obvious that the moment our rich man loses the co-operation of his bankers he will have trouble paying his bills; but so long as he stays sober the chances are that there will always be bankers beating a path to his door.

If motivated by economic advantage only, the Germans, the Swiss and the French should have been delighted to invest their balance of payments surplus in U. S. dollar obligations; particularly since the dollar through the middle sixties was by far a more stable currency than any other alternative one.<sup>3</sup>

We know, however, that we *did* have a balance of payments problem; rational or irrational, for good reasons or bad, the Europeans did *not* wish to keep on investing in dollar obligations, but complained that we were forcing them to lend us their own money against their better judgment, so as to permit us to buy up their own industries; and, moreover, so the accusations continued, we were exporting inflation into their otherwise so stable economies. That outcry being one of the facts of life, the United States was forced, so it appeared, to do something to deal with the balance of payments deficit. And the United States did do something: first, it imposed the surtax and second, the foreign direct investment controls. You know what has happened since these measures were taken; the surtax had no demonstrable effect on inflation whatever, and the foreign direct investment controls have not removed the balance of payments deficit: While, on the liquidity basis, we had a very small actual surplus in 1968, 1969 closed with the all-time record deficit of \$7 billion.

<sup>1</sup> Source: Economic Report of the President, Feb., 1970, Table 15 on p. 127.

<sup>2</sup> *Ibid.*

<sup>3</sup> In the period 1958-1967 consumer prices increased 15.5% in the United States as compared to 23.4% in West Germany, 28.6% in Switzerland, 34% in The Netherlands, 39% in Sweden, 39.6% in France and 55% in Japan. Source: U. S. Bureau of Labor Statistics, reprinted in The New York Times Encyclopedic Alamac, 1970, p. 423.

While it is true that \$7 billion is not a meaningful figure because of the peculiar and special roundabout flow of bank funds in 1969,<sup>4</sup> the fact remains that, as the Commerce Department's *Survey of Current Business* put it, "[W]ithout these special factors, the liquidity deficit would probably still have been very large, probably between \$4.0 and \$4.5 billion," i.e., a deficit substantially bigger than that of the crisis year 1967.

Yet despite this record deficit, 1969 saw the defeat of the gold speculators by the drop of the free price of gold to 35 dollars an ounce; and it saw a benign appraisal of the dollar by the same European bankers and businessmen who had been foaming at the mouth throughout the sixties. I do not believe that this change in atmosphere was all, or even primarily, caused by the events in France and the institution of Special Drawing Rights, although those undoubtedly played their part. Rather, I think the psychology changed, and the psychology changed because the United States had done what every banker had learned in his student days and knew in his heart was right: it had increased taxes and had controlled the outflow of capital funds. That pleased everybody, and the fact that, judging from results, the medicine we took was clearly not the right one, was not enough to dampen foreign (or domestic) enthusiasm for our course of fiscal responsibility.

I believe a second psychological event was of equal importance: the rush of American corporations to the Eurodollar market. Underwriting Eurodollar issues is a profitable business for European bankers, i.e., for the same bankers who used to make speeches about the parlous condition of the dollar. So all of a sudden we find that we can have a record balance of payments deficit, a minute balance of trade surplus, and continuing inflation all accompanied by increases in our gold holdings and by a conspicuous absence of hand-wringing in Zürich.

Because of these unaccustomed happy circumstances there is developing a consensus in the business community and in the Congress that the time has come to dismantle the foreign direct investment controls. I believe that such a step would be irresponsible and that it would risk creating renewed chaos in the international money markets. The main reason for this belief is my concern with the foreign debt overhang that has been created by the Eurodollar borrowing of American corporations during the last two years. That overhang has been estimated by the most well-informed experts in their field to be \$8 billion,<sup>5</sup> and it is at

<sup>4</sup> Since the rate of interest that could be earned on Eurodollar deposits was higher than that permitted for dollar deposits in the United States, U. S. residents shifted deposits to the Eurodollar market from which U. S. banks, usually through their foreign branches, borrowed it back. See "The U. S. Balance of Payments: Fourth Quarter and Year 1969," in 50 *Survey of Current Business* No. 3 (March, 1970), p. 27.

While the balance measured on the official reserve transaction basis showed a surplus of \$2.7 billion in 1969, a deficit of at least \$3 billion is widely forecast for 1970, see *New York Times*, April 13, 1970, and April 24, 1970. The well-known shortcomings of all these measurements do not, in my opinion, affect the nature of the problem.

<sup>5</sup> Of this total of \$8 billion, \$4.75 billion are in the form of convertible or straight

least possible, if not probable, that the abolition of the controls would lead to a substantial refinancing of these borrowings by transfers of capital from the United States. It is equally probable that corporate treasurers would be tempted to use their freedom from controls to get money abroad as fast as possible so as not to be caught by a reimposition of controls. One need not be a Cassandra to predict disastrous disorders under such circumstances, *i.e.*, massive outflows of capital being added to the current record deficit.

I believe controls can, at best, be phased out, and a valuable contribution to doing so would be a shift from the governmental promotion of Eurodollar borrowing to the promotion of issuing American equity securities in Europe. As you know, the existing program forces American international corporations to rely on foreign borrowing for the financing of off-shore investments. Not only are funds borrowed abroad by the financing vehicle companies of American corporations freely usable for foreign investment but the interest paid on those borrowings to foreigners is not subject to U. S. withholding tax. By contrast the proceeds from the sale of equity securities abroad are just as much subject to the Foreign Direct Investment Controls as any domestic resources of a company, and payment of dividends to foreign shareholders is subject to the withholding tax. Last August Stewart Bross, Jr., and John P. Carroll of the New York Bar drafted a superb report of the Committee on Foreign Investments of the American Bar Association on "Technical and Policy Problems under the Foreign Direct Investment Regulations" in which they recommended that "[S]ubject to appropriate safeguards against an immediate flow-back to this country, proceeds from sales of equities abroad should be treated the same as proceeds from a sale of debt securities abroad, since the effect of the two on the United States balance of payments is the same."<sup>6</sup> I think one could go further and say that because of the problem of debt overhang the sale of debt securities has, in the long run, a *worse* effect on the United States balance of payments. And, as that same report states, the "overhang from foreign borrowing is probably the principal factor which threatens to transform the Program from a temporary expedient to a permanent institution."<sup>7</sup>

But for the reasons referred to above I think that there are even better *policy* reasons for advocating the reforms recommended in that report than narrow economical balance of payments considerations. Despite the momentary rhetorical quiet in the international monetary theaters of war, the fact remains that U. S. companies finance foreign acquisitions by borrowing from foreigners just as much as they did before 1968, and

---

bonds with a maturity of seven years or more and the remaining \$3.25 billion comprise all other forms of indebtedness, including short and medium-term bank loans, revolving credits and bonds with a term of less than seven years.

<sup>6</sup> Technical and Policy Problems under the Foreign Direct Investment Regulations. A Report of the Committee on Foreign Investments, Section of International and Comparative Law, A.B.A., August, 1969, p. 7.

<sup>7</sup> *Ibid.*, App. A-2.

it continues to be true, as the extraordinary success of Jean-Jacques Servan-Schreiber's book, *Le Défi Américain*, illustrates, that there is widespread European concern with, if not hostility toward, U. S. direct investments in Europe. This psychological fact is, I believe, a far greater threat to our national interest than the economics of the balance of payments deficit. I know from a great many conversations that there was no single event in the postwar years that put as great a strain on German-American relations, for instance, as the buying up by the Ford Company of the minority shares held by Germans—an action that, be it for rational or irrational motives, caused enormous bitterness and resentment. I believe that large, very visible, wholly American-owned enterprises abroad constitute natural targets for political demagogues in times of unrest; they are good targets for right-wing demagogues because they are foreign and they are good targets for left-wing demagogues because they are capitalist. Therefore I think it is in the national interest that there be many foreign shareholders of American corporations—*quite apart from any balance of payments gains*. A solid block of contented foreign shareholders constitutes the best defense against anti-American business demagoguery.

There are two principal arguments against permitting the use of the proceeds from the sale of American equity securities abroad for foreign direct investment. The first argument is that equity securities once sold in Europe are likely to be resold to U. S. residents on an American stock exchange within a short time. The American Bar Association report to which I referred earlier discusses several ways by which such an immediate flow-back could be avoided; I have some doubts as to the extent of such a flow-back, and as to whether some such flow-back should not be welcomed as a consequence of phasing out the Program. The second argument holds that the purchase of U. S. equity securities issued in Europe would simply displace the foreign holdings of U. S. equity securities that would otherwise have been bought on American stock exchanges. I do not believe that this second argument is sound. The very fact of making an effort to market substantial blocks of equity in Europe with its attendant publicity, its stock exchange listings, its involvement of European bankers, brokers, publicity consultants, etc., might well produce just as dramatic an increase in the receptivity of the capital market for equity as the dependence of U. S. corporations on the issue of Eurodollar bonds produced for that market.

Since this latter argument, which in Washington jargon is referred to as the "additionality" argument, has been the principal weapon of the Treasury and the Federal Reserve Board in resisting any liberalization of the OFDI Regulations in that area, and since it is impossible to obtain any objective evidence on whether their fears are justified or not, I conducted a small private poll among knowledgeable European bankers on that question. I wrote eight letters posing the question of "additionality," to which as of today I have received six replies. Two of the very biggest banks gave a completely negative answer. They say there would be no "additionality." The most imaginative and well-reasoned reply, from a

dynamic German private banker, was an unqualified yes; and that from an American banker in London was a somewhat qualified yes: *i.e.*, he predicted an eventual broadening of the European market, even though there might be substitutions of European purchases for U. S. purchases of shares at first. A small private German bank also gave a somewhat qualified yes: they said that shares that could not be resold in the United States could probably not be placed "for obvious reasons," *i.e.*, they would be "second class shares." My correspondent added, however, that if the European equity issues were done in the form of bearer depositary receipts—one of the possible solutions advocated by the Bar Association report—and those securities were made fully exchangeable against ordinary shares issued in the United States, "experience had shown that such rights of exchange were hardly ever exercised." A third private German banker gave a negative reaction based on the assumption that Europeans would resent any issue of shares motivated primarily by the desire to finance foreign investments. The most interesting aspect of these answers is that the most carefully reasoned replies were also the most positive and that the three negative replies seemed to be oblivious of the fact that a primary issue on European markets with concurrent listing on European stock exchanges and the resulting involvement of publicity and people, in short, aggressive marketing, would be bound to change the present marketing climate on which they based their views. All replies either explicitly or implicitly considered the imposition of a "deterrent" against resale of securities in the United States, such as a separate excise tax recommended by the American Bar Association Report referred to above, an effective barrier to the marketing of equity securities in Europe. None of the replies, on the other hand, mentioned the U. S. withholding tax as an impediment, perhaps because their attention had not been drawn to this problem. Nevertheless, it may well be that the exemption from U. S. withholding taxes of dividends paid to shareholders abroad, a step recommended by the A.B.A. Report, may be attractive enough to European investors to make them accept the deterrent to resale in the U. S. that would be created by a new excise tax on the acquisition of their securities by U. S. residents.

These fields await their plows. I think that, rather than abolishing the Regulations altogether, we might well take the risk of permitting the use of proceeds of off-shore equity sales for foreign investment even though such off-shore equities are left freely exchangeable for domestic shares. It is only reasonable to assume that if, as I assume would be the case, the market could be substantially broadened, the flow-back to the United States would be at worst only a portion of this much bigger pie and that the end effect, while likely to create an additional outflow of capital, would certainly not produce the kind of capital outflow that is bound to occur if the Regulations were scrapped altogether.<sup>8</sup>

<sup>8</sup> Note that under the Articles of Agreement of the International Monetary Fund restrictions on capital transfers are not only permitted under Art. VI, Sec. 3, but may become mandatory on the United States: "*Use of the Fund's resources for capital*

Mr. HARRY FITZGIBBON. I would like to comment on what has been said by the panelists and then they can respond to what I have said. My first comment is addressed to Mr. Richards. It seems to me that there are two aspects to the IFC's activities—it acts in the rôle of investment banker and it acts as a member of the World Bank group. In my experience—I came from AID to Lehman Brothers—I find the IFC acting at times as acquisitively as a private banker and at others more generously than the nationals themselves. At times the IFC has advanced its interests in preference to those of the company or the other investors. At other times it has not taken on a deal which would not bring foreign exchange savings into a country, even though the country itself had decided that the transaction was desirable, because the IFC felt the decision was wrong. People who take deals to the IFC face this problem of dual capacity. But the IFC does render professional services and keep close track of investments in which it is involved, which is very important. It could, however, do more in the promotional area. Most lenders cannot find attractive deals and local partners. The IFC could do more of this type of activity, that is writing up and packaging proposed investments.

With respect to Mr. Wetzel's comments on Edge Act affiliates, I agree that these are not the vehicle of the future, or even of the present. For example, I would like to point out that overseas Eurodollar opportunities can be as attractive for companies operating domestically as overseas. A Baa-rated financing is cheaper in the Eurodollar market than it is here, strictly for investment here. In addition, five-year revolving credits may not be available here, but might be available with a foreign consortium. The Edge Act corporation is not a vehicle for this. In fact the Edge Act is not a relevant factor in the areas I have seen; few banks make money on their investments. When one deals in international transactions, I have noticed that lawyers have a greater impact than usual, because U. S. corporations are sensitive in matters of foreign law as are foreign corporations to U. S. law. For example, if a U. S. lawyer acts as a creditor's lawyer, he can kill a deal with London bankers.

With regard to the Office of Foreign Direct Investment, as to the philosophical analysis, I do not think there is any discrimination against equity that is not academic, because no one thinks they could sell that much more than they do already with convertible subordinated debentures. The market for equity overseas is limited. We have tried a spin-off, but there was no acceptance of that type of deal. The corporation is in a tough position to sell equity abroad. For one thing, the selling price would have to be lower than the present market in order to interest the syndicates there, which would make the present shareholders unhappy.

Mr. WETZEL. There are many project investments where a great deal

---

*transfers.*—(a) A member may not make net use of the Fund's resources to meet a large or sustained outflow of capital, and the Fund may request a member to exercise controls to prevent such use of the resources of the Fund. If, after receiving such a request, a member fails to exercise appropriate controls, the Fund may declare the member ineligible to use the resources of the Fund." Article VI, Sec. 1.

of good can be done with a small amount of money, and the IFC is making a real contribution in that area.

Mr. RICHARDS. IFC's rôle is to promote economic development by assisting the private sector. There is a duality of purpose but no inconsistency. We are getting increasingly into promotional activities. As to investment bankers, IFC acts somewhat like the first name on an underwriting list. Many investment bankers seek us as a "bell cow." The smaller Edge Act affiliates use us until they can work alone. The larger ones are also finding that there are some nuggets and are looking for investments with a view to reward.

Mr. OPPENHEIMER. I agree to a large extent with your comment that today the possibility of broadening the equity market abroad is academic, but that does not mean that we could not start making an effort in that direction. The convertible debentures sold by the international finance companies are not subject to the U. S. withholding tax, which would be a problem with straight equity sales as, under present law, dividend payments to foreign holders would be subject to the U. S. withholding tax. But you also said that, with regard to the balance of payments, the suggested change would not make any difference, but it does. The foreign private debt overhang of \$8 billion, assuming an interest rate of 10%, means that we are paying out about \$800 million annually in interest, *i.e.*, much more than would be the case with strict equity investments. The letters that I received in the small private survey I conducted indicated that if we wanted to sell equity securities in Europe, it could not be done with subsidiaries or with securities restricted in any way, because that would be resented, and the Europeans would be suspicious. With regard to the exchange of stock in acquisitions, that is very difficult to work out in most situations under the present Regulations and presents very technical problems.

Mr. WEITZEL. There are some unexpected uses for Edge Act subsidiaries. One bank uses its Edge Act subsidiary for all foreign currency transactions because they cannot be handled on the parent company's computers.

Chairman OLIVER. This is a practitioner's panel, and lawyers are generous as a group. We invite your comments from your experience in this area. We are looking for money, and have not found many rich new sources.

The Eurodollar market is a diminishing bonanza. Edge Act corporations are not as important as was thought. The IFC is a useful instrument in international financing. We would like to hear other ideas on where the money is for financing international transactions.

Mr. OLIVER then read the instructions from the Chairman of the Meeting as to comments from the floor.

Mr. PETER TROBOFF. I would like to ask Mr. Richards about the problem of obtaining new sources of financing. Would it be possible or helpful for development banks which are not authorized at present to take equity investments to obtain authority to make such investments?

Mr. RICHARDS. Yes, we welcome everyone in this field. We have

worked very well with ADELA and now with PICA. Equity is very important to provide flexibility; and, especially, to develop capital markets.

Mr. WALTER S. SURREY. One of the items raised was the question of leverage and the people at the table spoke of the IFC in this regard. As to cost of investment, the IFC is an attractive nuisance, attractive because it has money, a nuisance because its cost is too high. With the various guarantees it insists on, the real problem is not the availability of money, sources, or how the game is played, but even when you have a profitable investment you cannot pay off the financing.

Mr. RICHARDS. Let's deal with the cost of money, which is the thrust of your question. IFC tries to mobilize private capital to move with it, and private investors seek profits commensurate with risks. We try not to undercut the private bankers. We do try to do two things: First, to achieve economic objectives; and, second, to have local and foreign private capital work with us. On the loan side, the indicated cost of our dollars is about 9½%. Today, this is not high for long-term money in a developing country. The cost of equity depends on how the venture works out.

Mr. WETZEL. I think it fair to say that the track record of Edge Act corporations generally for making direct profits is only fair. That is why bankers talk of collateral benefits. I think they often do not really expect to make a profit commensurate with the efforts and risks involved, but are taking a long view and hoping these transactions will lead to other things that will eventually pay off.

Mr. SURREY. Aren't they often done for a big client of the bank?

Mr. WETZEL. They come in many forms. One banker told me he preferred not to have a client involved, since they would likely get blamed if anything went wrong.

Mr. FITZGIBBON. We have taken situations to the IFC and continue to do so, but one problem in dealing with the IFC is its tendency to want a senior position and a really senior position. In one situation in which we were involved a cash settlement of over \$400,000 had to be paid to obtain an IFC waiver. This was strictly an investment banking transaction and was discouraging. I for one would like to see them take a subordinate position sometime.

Mr. RICHARDS. We do not seek the senior position. IFC will fit in anywhere. We really try to arrange transactions in which we are involved with no tiers.

Mr. OPPENHEIMER. Perhaps one of the difficulties with the IFC-private investment conflict is the conservative debt-equity ratio you mentioned [60-40], which is really very conservative.

Mrs. PUSHPA N. SCHWARTZ. I would like to hear reactions from the panel to the proposition advanced by Professors Hirschman and Bird that a taxpayer in a developed country could earmark part of his tax payments for the specific purpose of investing in developing countries through International Development Funds.

Mr. WETZEL. I could see some advantage to such an arrangement but I would not want to say whether it would be feasible.



Mr. FITZGIBBON. This strikes me as just another means of passing on some type of privilege.

Mr. OPPENHEIMER. If you want to start reviewing the legislative structure, you might begin with the old Glass-Steagall split between commercial and investment banks, which is responsible for the small amount of activity in this area. The problem with the Edge Act legislation is that it was too little and too soon in trying to bridge the gap.

Professor TOM FARER. I would like to hear your reaction as to the effect of developments of the sort which recently occurred in Peru on investment.

Mr. RICHARDS. Events that disturb confidence have a substantial effect on the country and surrounding region. Private money must be attracted and lured; it flees at threats. We have found that any time hostilities break out in any particular place in the world, things go very slowly in that whole quarter of the world.

Mr. FITZGIBBON. There are still some ambulance-chasers around, who believe that when things go badly that is the best time to get in. We tried a financing for a major power company in Peru and had some trouble. The problem now is that there are not enough attractive situations, and various institutions are competing for the more conventional business risks. For example, in the financing I mentioned, ADELA stepped in with slightly better terms and undertook the financing. I don't believe that that's what anyone who invested in ADELA had in mind.

Mr. DAVID M. CRAWFORD. I have just returned from Africa where I worked for the African Development Bank. I would like to raise the question of the conflict of yardsticks of commercial profitability and planning priorities, *i.e.*, the national account yardstick. How often do you find that this conflict arises between the commercial profitability analysis and the national economy analysis?

Mr. RICHARDS. We must begin with the premise that the venture is going to benefit the country in the broadest sense. That is a sort of *sine qua non*. As to commercial profitability, if you want private money and private partners, who may be wanted for their skills as well as their money, then you have to attract them on a commercial basis.

Mr. FITZGIBBON. The national economy analysis you mentioned has an effect on the survivability of the project. In a Korean situation in which we were involved relating to construction of a large fertilizer plant, it was discovered that the operation would be dependent upon the importing of ammonia from Kuwait. If the government had been behind the project, we would only have looked at the commercial aspect, but in this case the transaction was dropped.

Mr. TROBOFF. I would like to return to the problem previously mentioned by Mr. Oppenheimer of the debt overhang created by the Foreign Direct Investment Regulations.

Mr. OPPENHEIMER. This is a very serious problem, mainly because, as I mentioned, it is the greatest single factor tending to make the restrictions on foreign direct investments permanent. If the restrictions were termi-

nated in their entirety, there would be the possibility of substantial outflows of money to refinance the approximately \$8,000,000,000 of outstanding debt and also corporate treasurers would be tempted to send additional money abroad in the event of reimposition of controls, as happened in France. So I cannot see how the program could be dismantled.

Mr. TROBOFF. Is there any gradual way?

Mr. OPPENHEIMER. As I suggested.

Mr. FITZGIBBON. One way might be to permit manipulation of the stock market to the point where conversion could be forced.

Mr. STEPHEN B. COHEN. Are we not saying that U. S. companies fail to treat the money market realistically; that there is no available money and, therefore, corporations do not care what the prime rate is? The FDIC, the Federal Reserve, and other regulatory agencies should be more flexible in allowing banks to act independently, rather than allowing them to be blackmailed by foreign banking and lending syndicates.

Mr. FITZGIBBON. Lehman Brothers is out of the underwriting business for at least five years; long-term money is simply not going to be available for that period of time. The problem is how to create vehicles for medium and short-term money. One question is whether we can create a shift in thinking to the Japanese approach of negative working capital.

Mr. WETZEL. It is unrealistic to think that U. S. commercial banks could get significantly into the foreign currency market. There are not more than half a dozen banks, perhaps a few more, that are equipped to handle the trading and hedging problems involved.

Mr. COHEN. Most American bankers are small loan officers and are not sophisticated in modern money market needs.

Mr. WETZEL. Most banks are not large enough to justify this kind of transaction.

Mr. RICHARDS. I think it is hard to say what should be the cost of money. The question is what is the cost of money. To the extent commercial bankers are engaged, public sources might take the long end of an investment. There are a lot of sources for money other than American banks.

Mr. OPPENHEIMER. I am not entirely clear as to the thrust of your question. If it is whether the interest rates are not too high for developing countries, my answer is obviously yes, they are too high for everybody. And I am afraid I must disagree with Mr. Richards about the cost of money being determined by anonymous, uncontrollable forces. Interest rates are what they are because of the decisions of governments and central banks, not because of bankers' decisions or because of an impersonal "market."

Mr. COHEN. The availability of money is outside the control of the central bankers and in the hands of a number of money brokers in the United States and Europe. The cost of money is astronomically high. Practically speaking, the problem is caused by the mushrooming number of brokers throughout the world, who end up adding fees and pushing interest rates

up to 12% or higher. Since the money available is in private hands and money is not in the hands of reserve banks or other lending institutions in this country, interest rates will be lowered only when money restrictions are removed in this country and money becomes more readily available in the domestic market.

Mr. CECIL HUNT. Is it not possible that more attention by lawyers to security arrangements in developing country projects could contribute to lower interest rates?

Mr. RICHARDS. At first blush, yes. But in developing countries when a company becomes insolvent it is hard to pick up the pieces, so a mortgage does not really confer security in terms we normally think of it. A bank guarantee is better than a mortgage, but it adds expense.

Chairman OLIVER then observed that the time for the discussion period had come to a close, thanked the panelists and the audience for their contributions and adjourned the meeting.

### THIRD SESSION

Saturday, April 25, 1970, at 9:30 a.m.

#### The United Nations and Race: Will United Nations Law Affect Victims of Racial Discrimination and Oppressors?

The session convened at 9:30 o'clock a.m. in the Jade Room of the Waldorf-Astoria Hotel, Professor FRANK C. NEWMAN of the University of California School of Law, Berkeley (Boalt Hall), presiding. Chairman NEWMAN welcomed the guests and participants. He noted that many had attended the Friday afternoon session on the United Nations and Lawmaking, so they were conversant with the difficulties of describing what is "United Nations law." The speeches and discussion of the morning would focus on the question: Assuming that there is a body of "United Nations law," however defined, regarding human rights, will this rapidly accumulating body of law truly be effective?

By way of introduction Professor NEWMAN discussed the outline "United Nations Law and Racial Discrimination," copies of which had been distributed to the audience.\*

#### UNITED NATIONS LAW AND RACIAL DISCRIMINATION: AN INTRODUCTORY OUTLINE

##### I. TREATIES:

A. *Convention on the Elimination of All Forms of Racial Discrimination*, 60 A.J.I.L. 650 (1966). (Entered into force Jan. 4, 1969.)

1. Nearly 40 nations are parties to this treaty. Its substantive provisions are comparable to what the American Law Institute might have produced as a partial restatement of 14th Amendment "equal protection law."

2. Enforcement. A Committee on the Elimination of Racial Discrimination ("eighteen experts of high moral standing and acknowledged impartiality . . . who shall serve in their personal capacity") considers reports on "measures that . . . [the parties] have adopted . . . that give effect to the provisions of this Convention." The Committee then makes "suggestions and general recommendations" to the U.N. General Assembly. It also has a prescribed jurisdiction over nation *vs.* nation and citizen *vs.* nation disputes. ("In effect, this treaty creates ombudsmen for racial discrimination, ex officio experts who have the power to investigate and to criticize what governments do about racial discrimination that the people who are governed find objectionable."—56 Calif. Law Rev. at 1563.)

\* Also available were reprints of Bitker, "The International Treaty Against Racial Discrimination," 53 Marquette Law Rev. 1 (1970); Newman, "The New International Tribunal on Racial Discrimination," 56 Calif. Law Rev. 1559 (1969); Coleman, Pollock & Robinson, "Rules of Procedure for the New Tribunal: A Proposed Draft," *ibid.* 1569.

During January, 1970, the Committee convened for its first session; the second is set for Aug. 31 to Sept. 18. (U.N. Press Release HR/401.) On January 29 "the Committee expressed the view that, under article 15 of the Convention, it could consider all the information it received from the appropriate United Nations bodies and organs relating to the matters covered by the Convention in regard to all colonial and dependent territories covered by the Declaration on the Granting of Independence to Colonial Countries and Peoples." (HR/399.)

B. *The U.N. Charter*. Articles 1(3), 13(1), 55(c), and 76(c) articulate the principle of nondiscrimination on grounds of race. Many other provisions—e.g., Art. 2(7) and Chap. VII—relate to racism.

C. The *ILO Discrimination (Employment and Occupation) Convention*, 1958, and the *UNESCO Convention against Discrimination in Education*, 1960. (A UNESCO protocol instituting a Conciliation and Good Offices Commission entered into force on October 24, 1968.)

D. Treaties not yet in force:

1. The 1966 *Covenant on Civic and Political Rights* and *Covenant on Economic, Social and Cultural Rights*. (See, e.g., Article 2 of each Covenant; Articles 24–27 of the Civil and Political Covenant.)

2. *Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity*, 1968 (applies to "inhuman acts resulting from the policy of *apartheid*, and the crime of genocide as defined in the 1948 Convention").

## II. DECLARATIONS:

A. *Universal Declaration of Human Rights*, 1948. (See, e.g., Articles 2 and 7.)

B. *Declaration on the Elimination of All Forms of Racial Discrimination*, 1963.

C. Miscellaneous and numerous pronouncements of the General Assembly, the Economic and Social Council, the Commission on Human Rights, the Subcommission on Prevention of Discrimination and Protection of Minorities, and other groups. (See A/7683, pp. 15–18, 37–42). Cf. Press Release HR/421, February 26, 1970: The Human Rights Commission "called for the application of effective pressure, in accordance with the Charter of the United Nations, on all States which violated the relevant resolutions of the United Nations dealing with the elimination of racism in all its forms."

See also p. 287 of the comprehensive study by Mr. Hernán Santa Cruz, E/CN.4/Sub. 2/301, June 24, 1969: "Some measures could be taken within the framework of resolution 8 (XXIII) of the Commission on Human Rights, and resolution 1235 (XLII) of the Economic and Social Council. In resolution 8 (XXIII), entitled 'Study and investigation of situations which reveal a consistent pattern of violations of human rights,' the Commission requested the Sub-Commission to prepare for its use 'a report containing information on violations of human rights and fundamental freedoms from all available sources.' The Sub-Commission was also in-

vited 'to bring to the attention of the Commission any situation which it has reasonable cause to believe, reveals a consistent pattern of violations of human rights and fundamental freedoms, in any country, including policies of racial discrimination, segregation and *apartheid* with particular reference to colonial and other dependent territories.' In resolution 1235 (XLII) the Council authorized the Commission and the Sub-Commission to examine information relevant to gross violations of human rights and fundamental freedoms. It decided that the Commission on Human Rights may, in appropriate cases, make a thorough study of situations which reveal a consistent pattern of violations of human rights." (And pp. 118-127 contain a most interesting discussion of international measures taken in connection with the protection of "indigenous peoples.")

### III. APARTHEID:

A. *Apartheid* is specially mentioned in the newly proposed treaty regarding war crimes and crimes against humanity (see above), as well as in the treaty and the declaration on elimination of all forms of racial discrimination.

B. By no means is it easy to decide which of the countless official pronouncements regarding *apartheid* constitute "U.N. law." For a recent description see A/7683, pp. 49-55.

C. Of special interest are the various U.N. organs and procedures that have been established specifically to deal with *apartheid* such as the Ad Hoc Working Group of Experts, the Council for Namibia, the Trust Fund for South Africa, etc. (*ibid.* 55-62; cf. the chart attached to this memo).

D. Generally see *Race, Peace, Law and Southern Africa* (Carey ed., 1968). Cf. this statement by the Chairman of the U.N. Special Committee on the Policies of *Apartheid*, Feb. 26, 1970: "Unfortunately, too many resolutions and too little action are all that the United Nations can show after having dealt with the problem for 25 years. In this period all peaceful procedures for settling this issue, outside of those provided by Chapters VI and VII of the Charter, have been tried but to no avail." (Press Release GA/AP/178.)

### SUPPLEMENTARY EXCERPTS REGARDING U. S. POLICIES

1. "In our view, it is very important for the world community to attack racism and discrimination before such practices become so abusive that they do indeed pose a threat to international peace and security. . . . We think, as President Cassin noted, that the major task is one of education. . . . My country, like the Netherlands and others, is in the process of reviewing the Convention to Eliminate All Forms of Racial Discrimination. Our procedures for ratification are complex, as treaties become the supreme law of the land under our Constitution. . . ." We shall join with

\* When the U. S. signed the racial discrimination treaty on Sept. 28, 1966, it declared: "The Constitution of the United States contains provisions for the protection of individual rights, such as the right of free speech, and nothing in the Convention shall be deemed to require or to authorize legislation or other action by the United

pride the world community in observing an International Year to Combat Racism and Racial Discrimination in 1971 and in working to perfect the mechanisms, legal and other, that serve to assure the rapid end of the practices of racism and racial discrimination.”—Mrs. Hauser, Feb. 25, 1970, US/UN-21(70).

2. “[M]y Government does not approve the use of force either to advance or to obstruct the course of justice in southern Africa. . . . Also, we believe the exclusion of South Africa from the United Nations or its agencies would not advance the course of self-determination and non-racialism in the area; rather, we continue to believe that contact, dialogue and persuasion are the right means, however slow their working may be.” Mr. Yost, Nov. 20, 1969, US/UN-169(69).

3. “Ambassador Malik alleged that my country is supplying arms and military equipment to the Government of South Africa. This is a complete fabrication and utterly without foundation. Let me solemnly here and now affirm that since 1963 the United States has prohibited the sale and shipment to South Africa of arms, ammunition, military vehicles and equipment or materials for their manufacture and maintenance.”—Mr. Phillips, Jan. 30, 1970, US/UN-10(70). However, “at the time that embargo was imposed, the representative of the United States in the Security Council made clear, and the record will show it, that our compliance with the embargo would not preclude the fulfillment of orders made prior to the imposition of the embargo.”—*Id.* US/UN-12(70); cf. remarks of Rep. Coughlin, Cong. Rec., Oct. 15, 1969, at p. E8503.

4. “Although the situation in South Africa is deplorable my delegation cannot agree that it is a threat to international peace and security, thus warranting Chapter VII measures.”—Mr. Johnson, Nov. 14, 1969, US/UN-159(69); cf. U Thant message to Addis Ababa, Feb. 17, 1970: “The United Nations has recognized that the perpetuation of these evils [colonialism, racial discrimination, *apartheid*], particularly in their gravest manifestations in southern Africa, constitutes a great danger to international peace” (SG/SM/1209). And see Van Dyke, *Human Rights, the United States, and the World Community* (1970) p. 214: “If the principles and the reasoning applied to Southern Rhodesia justify a finding that it constitutes a threat to the peace, it is a very short step to the conclusion that South Africa does too.”

5. “We wish to extend our compliments to the Working Group, and to its very able chairman, Ambassador Boye, for the conscientious work performed and its devotion to the cause of human rights in Southern Africa. Its reference to international norms of conduct as applied to South Africa and Namibia, Southern Rhodesia and African territories under Portuguese administration afford useful guidelines by which to measure conditions in those areas as well as in other areas of the world. . . . Each government represented here has a keen interest in one or another specific situation

---

States of America incompatible with the provisions of the Constitution of the United States of America.”

of violations of human rights. It is the combined chorus here that in the end will serve to aid all mankind. No Member should face objections here when he lays on the table the facts of any flagrant violation in the world. What else, after all, is our purpose and mandate under the U.N. Charter? Article 2(7) must not be used as a shield to cover up any country's failures in meeting the standards of the Universal Declaration of Human Rights which all humanity has accepted and which are always before us."—Mrs. Hauser, March 17, 1970, US/UN-33(70).

Chairman NEWMAN then introduced the first speaker, Ambassador Egerton R. Richardson, Ambassador of Jamaica to the United States. The CHAIRMAN described the tremendous personal influence Ambassador Richardson has had in the area of international human rights, particularly with regard to racial discrimination, in his earlier capacity as representative to the United Nations. He had an important rôle in the Teheran Conference during Human Rights Year, 1968. Further, Ambassador Richardson's thought and advocacy have had a great impact on the words of the racial discrimination treaty.

## WILL THE RAPIDLY ACCUMULATING BODY OF U.N. LAW ON RACIAL DISCRIMINATION TRULY BE EFFECTIVE?

*By Egerton R. Richardson \**

Professor Newman has given a full and lucid summary of United Nations law on racial discrimination. This raises the question, Will this body of law be truly effective? I ought to give my answer at the outset, because I am certain that many in the audience will want to shoot at my conclusions, but I will leave the answer to the end of my speech. My position should become clear as this discussion develops.

I would like to make two initial points of explanation. The first is my assumption that United Nations law does not include the various resolutions of the United Nations organs and bodies. The second is that the time span I will deal with is not the span of a generation or more but is limited to the next ten years, the decade of the seventies.

We are presented with a great practical difficulty of separating law from other measures relevant to racial discrimination. United Nations law in this area is in fact inseparable from other aspects of United Nations operations such as advisory councils, seminars, dissemination of information and propaganda, etc. Some consequences of this fact are that we must take into account not merely "laws" but the combined effect of legislation and other measures.

I will adopt an approach different than the usual academic analysis;

\* Ambassador of Jamaica to the United States. The views expressed are solely those of the author.



I will take a worm's eye view, if you will, of the effectiveness of United Nations law on the victims of racial discrimination and oppressors. I will place myself in the position of a potential victim of racial discrimination. How does he see this law as affecting him? How and where will this law improve his condition? What are his fears of where the law will not help him?

The main item of United Nations law is the Convention on the Elimination of All Forms of Racial Discrimination [hereinafter called the "Convention"], a very comprehensive document indeed. First, I will discuss a number of serious internal structural deficiencies in the Convention, which I believe will militate against the victim and will aid the oppressor. Then I will discuss external factors relevant to the effectiveness of the Convention.

Turning then to internal structural deficiencies, the first is that the Convention permits reservations. This is the direct opposite of the UNESCO Convention, which does not permit reservations to accompany ratification. Thirty-seven nations have adhered to the racial discrimination treaty, and 16 have ratified with reservations. These reservations are concerned primarily with the ultimate authority of the International Court of Justice; they make clear that the Court is not really a court but is merely an arbitration body meant to deal with whatever problems are given to it. And other reservations will come. These will be private interpretations of the substantive provisions of the Convention, insisting that the international community accept the internal legislative measures of the reserving state as adequate under the Convention. Therefore, I believe there is a low probability that the Convention will provide significant aid to victims of racial discrimination, at least in those countries making such reservations.

What does the average citizen want of international law in this area? He wants to procure what the legislation of his own state has not done. He wants effective protection and effective remedies. As an example, see Article 6 of the Convention. If someone practices discrimination against him, he wants the international law or organization to make him stop. If he suffers damage, he wants reparations and compensation. Therefore our focus must be on the implementation procedures set up by the Convention.

Herein lies the second structural deficiency of the Convention. Article 14(1) establishes that complaints from individual victims may not be received by the Committee on the Elimination of Racial Discrimination unless the state party recognizes the competence of the Committee. To this date, of the 37 ratifying states, not one has declared its recognition of the competence of the Committee. Therefore the remedies listed are unavailable unless the victim can get a state other than his own to make a complaint against his government. To do this would usually be highly prejudicial to the interests of the other state, and the situation is therefore highly prejudicial to the victim's own interests.

The third structural deficiency is that the internal body referred to in Article 14(2) need be established only by those states who have made a

declaration under Article 14(1). This has been made as optional as optional can be. There is no *requirement* to set up such a body. We all know of the infirmities of officials, the defective aspects of administration, and the weaknesses of judges, even sometimes in the United States. This underlines the need for protection beyond that provided by the government concerned.

Sweden and Denmark, whose constitutional structures are probably as far apart as those of New Zealand and France, or Rumania and Guyana, have recognized the need for such additional protective institutions. And the United States is beginning to recognize this need, however grudgingly. [Laughter] The Racial Discrimination Treaty also recognizes this need, and provides the possibility for such an institution; but unfortunately it does not insist that such a body be established within every ratifying state party.

The fourth structural infirmity is that under Articles 11 and 12 the Committee is deprived of investigative and fact-finding power. Such power is essential to the effective operation of an institution like this Committee. If the fact-finding power is limited to individual-versus-state or state-versus-state complaints, if the Committee does not have any independent power, it must either accept the actions of a state complained against or must retreat to the position of ignoring the realities of the situation presented.

The fifth and final structural deficiency is that the Convention creates severe conflicts between many rights and freedoms. For example, there is a fundamental conflict between the freedom of expression and the right to be free of discrimination based on race. This infirmity leaves room for states to escape their obligations if other rights (of the oppressor, for instance) are prejudiced.

The Convention does not overlook the potential for growth of the Committee as an institution protecting victims of racial discrimination. The Convention provides for "general recommendations," and under this mandate the Committee conceivably could convert the option in Article 14(2) into an obligation. The Committee may acquire, by its own initiative, the right to investigate and to uncover fact. The Committee may even persuade the General Assembly to resolve the conflicts of freedom above mentioned. My view, however, is that there is very little, if any, possibility that the growth potential just described will be realized within the next ten years.

Turning to the second aspect of the Convention, then, we come to external factors which must be considered in any attempt to predict the eventual effectiveness of the body of United Nations law regarding racial discrimination. The United Nations has made the unfortunate choice of enacting "legislation" *supplementary* to the original Charter. One particular consequence of this is especially unfortunate. By its very nature, this legislation establishes consequences which nations may assume or decline at their option. This will cause pressure on states which do not sign these conventions to be relieved. The United Nations will become too

occupied with the procedural aspects of the Racial Discrimination Treaty, its attention will be diverted, and the pressures of all United Nations bodies that are now brought to bear on countries such as South Africa and other extreme violators will be diluted.

A second external factor is the political environment in which this legislation will function. The present climate must not, simply cannot, be continued.

At this juncture I should note that it was only when the new Third World countries joined the United Nations, freed from the bonds of colonialism, that the world recognized the need for legislation in the area of racial discrimination. With the 1960-1962 influx of new countries, this legislation began to move. Such movement accompanied a recognition that the non-white countries constitute a substantial portion of United Nations representation, a substantial portion of the potential membership of any convention of this sort.

A third external factor is that the non-white, Third World countries are still suspicious of the former colonial Powers. Accordingly, they do not judge the movement at its face value. The process of decolonization is not yet completed. These militant new nations, still emerging from under the cloud of colonialism, exploit any and all means to attain self-determination of their futures. These countries will not surrender their sovereignty, either newly attained or not yet completely attained, to international institutions, particularly when they remained suspicious of the big Powers in those institutions, the former colonialists themselves. I therefore have grave doubts of the success or effectiveness of the United Nations' efforts to succeed in persuading these countries to surrender their sovereignty.

My answer to the question posed at the outset, then, is that this body of United Nations law on racial discrimination will not truly be effective unless certain other conditions are fulfilled. I will cast this conclusion more optimistically by saying that this body of law will truly be effective if certain conditions are fulfilled. The first condition is that the implementation machinery of the Convention must only convert Article 14(2) from an option into an obligation. The second condition is that the General Assembly must refrain from distracting attention from the pursuit of the aims of the Charter of the United Nations. Failure to accede to the supplementary legislation must not permit a state to abdicate the pursuit of the original purposes of the United Nations.

The question thus arises, given certain limited United Nations resources in time, money, and personal effort, where should our efforts be directed? The amount of money already allocated, it could not be further reduced. I would not advocate the curtailment of any of the present efforts in the area of human rights and racial discrimination. New efforts and new funds and new resources of energy must be found. These should be utilized in an area where the United Nations institutions and legislation, etc., will not find themselves fighting entrenched internal powers. The aim must be to

get inside allies. It is impossible to attain effective outside coercion. Only a nation's own people are able to establish the necessary remedies. We must use the United Nations' institutions to stimulate the growth of institutions dealing with human rights inside the states themselves.

This suggestion has been before the United Nations in the past. The suggestion has been made to establish national commissions to deal with violations of human rights. The proposal now before the General Assembly, however, is unfortunate in that it leaves it up to the states to decide for themselves what shall be done internally. If the efforts of the United Nations are not directed toward these two conditions, if internal institutions are not established, and if the implementation machinery under the Convention on the Elimination of All Forms of Racial Discrimination remains devoid of investigative and fact-finding power, then my conclusion must be that the body of United Nations law regarding racial discrimination will remain ineffective for the foreseeable future, the decade of the seventies.

Chairman NEWMAN. Thank you very much, Ambassador Richardson, for a thought-provoking address.

I am astounded at the bulk of materials that comes across one's desk from the United Nations. I am especially delighted, however, when various releases from our United States Delegation make reference to Mrs. Rita Hauser's speeches. They exhibit a crispness, dedication and drive that are truly refreshing.

Mrs. Hauser's dedication and drive are illustrated by her efforts that culminated yesterday in hearings on the Convention on Genocide. Senator Fulbright himself attended these hearings. You all know, furthermore, of the famous vote of the American Bar Association this year, voting 136 to 140 on the question whether to urge United States ratification of the Genocide Convention. One suspects that it will not be long before that vote is brought to a tie and eventual reversal.

Mrs. Hauser has worked mightily on the old conventions, on new initiatives, and on numerous other issues in the area with which we are concerned today. It gives me great pleasure, therefore, to introduce Mrs. Rita Hauser, United States Representative to the United Nations Commission on Human Rights.

## UNITED NATIONS LAW ON RACIAL DISCRIMINATION

*By Mrs. Rita Hauser \**

It is nice to see so many people in our audience. It is indicative of the fact that there is indeed great interest in this area. I must agree with Ambassador Richardson's conclusion of a qualified negative. Some of my

\* United States Representative to the United Nations Human Rights Commission.

views may appear as shocking, and I hasten to assure that they are my personal views, as an international lawyer, and are not the official views of my country.

It must be recognized that international human rights is politics; any other view is simply foolish. The United States has learned within its own boundaries the significance and intensity of human rights politics. The traditional theoretical or academic approach is not possible anymore. That time has passed. The work that was done was singular and important, but the advent of non-white nations has necessitated a shift of viewpoint. We must adopt a concrete outlook; we must be concerned with concrete situations involving problems of religion, race, political and civil liberties.

Having recognized this, we find in the United Nations discussions on concrete situations that the parties immediately crystallize along old lines. At the outset of a debate it is possible to predict, even before discussion begins, the eventual positions of nearly every state, irrespective of whatever logic or realities may be exposed during the debate. It is a simple task to predict positions that will be taken by delegates, irrespective of rationales or facts presented. Politics predominate. It is recognized that the political consequences of words are indeed great and that the delegates must vote according to the predetermined policies of the governments which they represent.

A good example has been the effort to establish a High Commissioner on Human Rights within the United Nations. This was not a "Big Power" proposal. Nevertheless, it was compromised and watered down through each successive discussion. Each time the item came up in the General Assembly, moves by various nations have insured that the item never has been discussed. In the last General Assembly a concerted effort led by the United States finally got the item into the General Assembly debate and a resolution was passed to vote on this matter in the session that will take place this year. Here was an attempt to create an institution with truly denuded power. The U.S.S.R. has continually and violently opposed this measure and has announced that if the High Commission is set up, the U.S.S.R. will not support it, will not finance it, will not work with it.

The reasons behind this situation are based on the following facts. Russia and its allies will not permit any international institution to pierce into their internal affairs to comment upon what it sees and to expose the situational realities. The conflict in the Middle East is an added factor. The Arab countries support and are supported by the U.S.S.R. Accordingly, the Arab nations support the Russian position, despite all arguments that it may be to their advantage to establish such a High Commission. Such a Commission could investigate allegations of Israeli violations of human rights with respect to Arab citizens and Arab territories. But when the vote is called, in modern political parlance the "crunch is on" and the Arabs vote with the Russians. This creates a most formidable opposition.

But the actual debates do not revolve around political considerations. Instead they turn on academic and theoretical discussions of sovereignty and other doctrines. The real reasons behind the votes, however, are po-

litical, and have nothing to do with these theories. If the United States enters the picture, the African countries immediately become nervous. The debate is then characterized as an East-West conflict, as a revival and resurrection of the Cold War. Despite the fact that our interest often had nothing to do with the Russian viewpoint or Cold War politics, this was the way it was viewed.

I ask, therefore, should we sit back? Should we let other countries take the lead? If we sit back, there may be others who will go ahead. There may be no force or inertia behind the movement. We are thus faced with an unavoidable dilemma, one that has inevitable political consequences, turning out bad regardless of the outcome. I am, therefore, like Ambassador Richardson, fairly pessimistic. As long as the issues are color and colonialism our status is very low. It may in fact be better to stand back and foster interest and attention by other countries. There may be no such other countries, and everything may fall apart. But it is very difficult for the United States to have any impact as long as political realities remain as they are today.

I now turn to the matter of individual petitions to the United Nations Commission on Human Rights. These petitions are received from all over the world. It has been difficult to establish procedures, and there are really no effective procedures to deal with these petitions. They arrive at the United Nations and are neatly placed in red manila folders. Supposedly, we meet in closed session periodically to consider these petitions, but this does not really happen. Previously no one went through the petitions received by the United Nations. When I became the United States Delegate to the Human Rights Commission, I made the audacious pledge to do something about this and I have had a staff sorting through these petitions and reading them thoroughly. Some are frivolous, it is true. But many are not; many evidence serious violations of human rights.

The position of the United States once again is the cause of immediate political conflict. The problem presented to our Mission and Government is: What should be the profile of the United States? If, for instance, we brought attention to petitions regarding *apartheid*, this would be fine. The question of *apartheid* is freely debated. There is no discussion of sovereignty or the other doctrines used to conceal political considerations. If, however, we brought forth petitions regarding Russia, Greece, Brazil, Indonesia, etc., the defense of Article 2(7) of the United Nations Charter is immediately brought forth. It is said that these situations are of no concern to the United States. If the United States is backing the investigation, it is alleged to be for political reasons. Faced with these problems, I simply had to cease my efforts. After all, one needs *some* support for one's position on these matters. Our usual international friends, the Europeans and Latin Americans, show great shyness on these issues.

I therefore turned my efforts to establishing procedures to look into these petitions and to report on the findings. In the Commission we carried the procedural innovations by a margin usually of one vote. But once they went on up the ladder of the United Nations Administration, the proposals

were decimated. We hope to get some procedure through the Economic and Social Council this year.

My conclusion is that most countries simply cannot accept the United Nations' organization looking into their internal matters. The doctrine of sovereignty is the real problem. I have no answers. My tentative conclusion regarding the enforcement of the body of United Nations law is that we must strengthen human rights organizations on the regional level. On the regional level the political considerations that rise to the surface are considerably less acute. The European Commission of Human Rights is a good example. It functions well, in an atmosphere of considerable political sophistication. When faced with the delicate situation of Greece, the European Commission dealt with the problem with great courage. Only the future will tell what the effects of these actions will be.

Along the same lines, the Latin American Convention on Human Rights should be examined. One should not ignore similar developments on the continent of Africa. The regional approach avoids the problems of "United States v. U.S.S.R." and in Africa avoids the diverting difficulties of the colonial problem. Therefore, the United Nations' rôle should be to stimulate these regional developments, and, as Ambassador Richardson has suggested, the development of internal bodies to deal with human rights questions as well.

Turning briefly to the problems of the United States, I am even more pessimistic with regard to the effective enforcement of United Nations human rights law within the United States. On this question, we missed the boat early in the game. It could have been argued quite successfully at one time, I believe, that some obligations in the United Nations Charter were self-executing. Decisions in the lower courts, notably California but others as well, show that the courts did not support this idea. There is no Supreme Court law on the subject of self-execution of the United Nations Charter obligations that is definitive.

The time for such successful argumentation is gone. I am extremely dubious that any aspect of the United Nations Charter would be held self-executing today. Turning to other conventions, we all know that the Genocide Convention is the subject of present concern. I consider this to be the most innocuous convention in the political sense. My prediction is, however, that in today's domestic atmosphere the Senate will not move very far or very effectively, even on this convention. I am extremely dubious about the possibilities of ratification of other conventions.

The Racial Discrimination Convention is especially difficult in this regard. The Senatorial environment, I fear, would be extremely hostile. Civil libertarian groups that I have spoken to have serious doubt about the convention as well. The difficulties of the United States are considerably greater than those in systems not of the U. S. prototype which have no federal-state problems and which often have no constitutional "restrictions" to be interfered with by ratification.

I point particularly to Article 4 of the Racial Discrimination Convention. The ideas in Article 4 fly directly against the American idea of free speech.

In many other countries, if organizations promote and disseminate ideas based on racial hatred, the state simply declares the organization illegal, outlaws it, and prohibits its activities. The United States' approach, however, is freedom of information, at least up to the point where that invisible line is crossed into areas of sedition and incitement to riot. The Convention flies in the face of these First Amendment freedoms. Many other countries, however, consider Article 4 to be the very heart of the Convention. If we ratified, we would have to make serious reservations to this provision of the treaty.

I point secondly to Article 5(e). Few Senators would see these substantive rights become the substantive law of the United States today. I suggest you study these provisions carefully, and come to your own conclusions. My own conclusion is that the United States will remain outside the Race Convention.

Our Government has recently considered a new approach to our signing of such human rights treaties. Viewing the situation realistically, and I am sorry to report this, I must agree with the proposed approach that it may be wrong to sign a treaty which we have no intention of ratifying. This is the position that the United States has taken on the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity.

The reasons behind these restrictive developments are problems purely of domestic politics. They are problems of States' rights and State-Federal jurisdiction. If you cut through the real underlying psychology of the Senate today, our Senators, unlike legislators in other countries, feel there is no need for American citizens to turn outside of the United States for protection and remedies. For us protection is available within our own system. I admit this is strictly a "Hauser analysis" of the American scene, but if I am correct, it follows that we should take a different outlook in the United Nations.

Rhetorically, in the past we have said that we are against diverse violations of human rights. When the issue comes to a vote, when solid resolutions, possibilities of enforcement, serious political commitments, etc., are required, we either vote no or, more frequently, abstain entirely. We have reached the point in the United Nations that for many our credibility is questioned.

I recognize my view is radical, that it may be better to recognize our problems regarding international law and human rights, to openly articulate these problems and take the position that they are peculiar to us. Perhaps we should also say that we are sincerely interested in working with others, helping them to raise their own standards in human rights enforcement, but that we must recognize that we cannot go along with the same measures. It may well be that this is the only realistic outlook in today's political climate.

Chairman NEWMAN thanked Mrs. Hauser and noted that it was indeed alarming to see that American rhetoric had reached the point that its sincerity was being questioned! [Laughter.]



He suggested that the audience might have reasonable cause to believe that having been presented with two pessimists, they would now be hearing two optimists. He assured the audience that no censorship was involved in the selection of the panelists, and he then introduced Mr. T. T. B. Koh, Ambassador of Singapore to the United Nations. Ambassador Koh, the CHAIRMAN related, has been an extremely able and effective Ambassador and representative of his country. He was especially interested in Mr. Koh's comments because the problem of racial discrimination apparently has been of little concern to the various Asian nations. He hoped that Mr. Koh would illuminate that situation for the audience.

## UNITED NATIONS LAW ON RACIAL DISCRIMINATION

*By T. T. B. Koh \**

I must suggest that the two speakers you have just heard have given too narrow an interpretation to our topic. Our focus is on how United Nations law has "affected" the victims of racial discrimination and their oppressors. In my opinion, this body of law has affected the victims and oppressors in ways other than those discussed by the primary speakers.

One of those other ways is that the constitutions of most of the new Member States of the international community have tried to mirror the United Nations Declaration on Human Rights and the other human rights covenants. It is true that those mirror images are highly qualified, the local administrative realities accounting for a lack of effective enforcement procedures. But injecting such international content into those new constitutions has placed those new national governments in a defensive posture. The situation allows victims of discrimination to assert claims against their countries, citing the constitutions and the body of United Nations law, asserting that the national government is obligated to live up to the promises it has made. In such a posture, the government is forced to explain why it has not in fact enforced its obligations, why it permits conditions to exist in violation of legally recognized human rights.

I must also say that using a ten-year time-frame to denote the near future is a very Western view, or at least a Western Hemispheric view. [Laughter] I and the nations in my part of the world tend to have a longer time-frame. I am inclined to define the "near future" as the next 25 years. Accordingly, I am cautiously optimistic about the effectiveness of United Nations law.

Having taken this position, I must come to my own defense and persuade you to share my perspective. In my opinion, the body of United Nations law on human rights is very impressive. We must recognize that the architects of these conventions are representatives of governments, not of peoples. We must recognize that the governments of the world are the biggest violators of human rights. If they can affirm the rights contained

\* Ambassador of Singapore to the United Nations.

in these conventions, this fact is very impressive in itself. Objectively, it is almost unthinkable that these violators could have drafted and codified the ideas that we see in these conventions. Therefore our rôle must be to stimulate a greater local conformity with these verbalized ideals.

The reason why Asian nations take so little interest in human rights matters is because most Asian governments have such deplorable records in their respect for the human rights of their citizens. We cannot expect the representatives of governments to be self-critical. This is why the only instance of an allegation of racial discrimination in the United Nations is against South Africa, whereas we all know that racial discrimination is a universal phenomenon. This is not surprising, since most government representatives are supposed to make friends, not enemies. [Laughter] For governments to take a strong stand on human rights would be to submit themselves to a soul-searching self-examination. If I compel my neighbor to fulfill human rights obligations, he will probably want to tell me to fulfill the same obligations. Therefore, the Asian record is understandable.

But I am not completely cynical on this point. In the formulation of human rights standards, the formulators have sometimes ignored present realities. What I am saying is that the objective realities in the developing countries often make it impossible for the governments of those countries to implement the idealized standards of human rights contained in United Nations law. The present state of nationhood in many developing countries is quite fragile. We lack the self-discipline and the stability that the Western nations have possessed for a long time. Therefore, when those nations subscribe to the international standards on human rights, it is with the understanding that this is an expression of ideals, an expression of a goal to aim for. I think this point is well worth making.

I would like to ask first, what information exists with respect to the relief given, or the fate of citizens who have submitted complaints to the Secretary General or to the Human Rights Commission alleging violations of human rights by their governments? My own impression is that some citizens do enjoy some relief from the alleged oppressions. In other cases, of course, government reprisals have been severe. A study of the consequences of complaints and petitions would be valuable.

Second, I would inquire into areas other than pure "enforcement." Where does the United Nations body of law have an effect other than through enforcement?

Third, I would ask the panelists whether they agree with me that the formulation of human rights conventions does not necessarily assume a present application but a subscription to a set of goals, and that an intent of immediate enforcement ought not to be implied by such a subscription to goals.

Chairman NEWMAN. By way of introducing our next speaker, I would like to go back to something Ambassador Richardson spoke about. His suggestion of a new approach to human rights did not imply subversion

or revolution but some other form of legal activism. Our next speaker is experienced in such other forms in our own country.

I would also like to refer back to Rita Hauser's problem of "U. S. v. U.S.S.R.," and of the African nations' sensing of vibrations of residual colonial sentiments. Let's pretend that Washington, D. C., is New York (the United Nations), the Democratic Party represents the United States, the Republican Party is the U.S.S.R., and the deep South is in between. I offer for your thought the following question: What would be the outcome if a citizen of the South were to come to Washington (the United Nations) to complain of a violation of his human rights?

Mr. Coleman, our next speaker, has never been persuaded that the slow approach should be adopted in the domestic arena. We will see what his views in the international arena are. It is a great pleasure to present Mr. William T. Coleman, U. S. Delegate to the United Nations General Assembly.

### REMARKS OF WILLIAM T. COLEMAN, JR.\*

I understand that I am supposed to ask questions of the two principal speakers, Ambassador Richardson and Mrs. Hauser. Before I do, however, please permit me several comments.

First, it is my fond hope that the United States' human rights policies, both domestically and internationally, will be affected by the present activism of its citizens. I am reassured when I see great student movements such as are now going on at Yale in New Haven and at Penn State in Pennsylvania. These movements of the young and the black can make the United States a more responsible world citizen. I am confident that the citizens of this country will recognize our national interest in the future of the United Nations and its adoption of enforceable provisions of law in the human rights field.

Second, I would like to suggest that the authors of the future treaties and conventions drafted under the auspices of the United Nations, particularly in the area of human rights, could benefit greatly from the far-sighted wisdom of the writers of the Constitution of the United States. The vagueness of the equal protection clause of the United States Constitution allows the Court to develop its content through many great and moving decisions. The wide-sweeping general expression present in the United States Constitution is contrary to the historical development in international conventions on human rights.

Third, the principles of the United Nations Charter do aid United States judges in their decisions. Though they do not articulate it in their opinions, these judges realize that the issues affecting American people go beyond that of black and white to all sorts of basic human rights. Thus these principles affect the direction which the United States will go domestically.

\* U. S. Delegate to the 24th Session of the United Nations General Assembly.

The difficulties encountered by the Genocide, Race and other United Nations treaties in the Senate are eloquent proof of the great effect such provisions have on the domestic law of the United States. The great attention given to these measures by the Senate is proof of their great effect on our country.

In brief response to Ambassador Richardson's excellent talk, I will state my opinion. In the basic historical United States document we find that minorities are given rights. These rights are vaguely stated. The sponsors of the provisions did not really know what their words truly meant in all their sweep or would mean to a future generation of United States citizens. I refer you to the 14th Amendment. If you can see in that Amendment's adoption an intent to end all forms of racial (and, indeed, now sex) discrimination, you are better than the past historians who have dealt with the question. If all the rights that were foreseen or even intended at the time had been spelled out, the effort to adopt the Amendment would have failed politically. Documents such as these must necessarily be vague to be effective.

Turning now to my task of asking questions, as I understood your thrust, Ambassador Richardson, you would tell a government, and therefore a majority of the people, that even though it has the right to act, it has not the right to act in an arbitrary or discriminatory fashion against the interests of the minority. I would ask how, in the countries represented here, the drafters of their basic governing documents protect their minorities from oppression by the majority. The United States has not been particularly effective in this area. The Supreme Court of the United States has continually wrestled with the question of the basic document's intent in regard to the minorities. The real mission of the human rights movement is to develop methods by which a court or other body can tell the majority that, even though it has the votes and the troops, it cannot work its will in every case but must protect those of the minority.

Secondly, I question you about the extent of development and success of institutions in your home countries which are created to bring about a viable system of dealing with and protecting human rights. A good legal system is often effective in narrowing and refining questions that must be answered. It is only by narrowing and refining questions that the most difficult issues can be resolved. It is interesting and perhaps shocking that in our country the least democratic institution—the court—is relied upon to develop such a system and to resolve such issues.

I have two final short questions. First, why has the period of ten years been chosen for this discussion? I agree with Mr. Koh that Ambassador Richardson's confinement of the discussion to a ten-year period is too narrow a view. Secondly the United States experience can, of course, be looked to and analyzed in terms of political, economic and social policy. Nonetheless, no progress would have obtained if no solid system of law had developed. My final question, therefore, is: What will be the international equivalent of the Supreme Court of the United States and its other political institutions which provide a forum for the adjustment of

disputes over what is the meaning or effect of its basic Constitutional provisions?

Chairman NEWMAN thanked Mr. Coleman and asked for discussion among the panelists before opening the floor to questions.

Ambassador RICHARDSON. When I was in school I was taught that when I was wrong I should admit it. The ten-year limit on this discussion was agreed to at the start, I thought. It simplified my problems of analysis. In fifteen minutes one cannot cover the field for a longer period of time. Accordingly, I limited my comments to the actual implementation clauses within that scope of time.

I have doubts about the wisdom of trying to foster vagueness and not to specify what rights are to be protected. The question is: Would a vague statement have been sufficient? Would it have been wise to remain at the Declaration, or even to remain at the Covenants, but not to proceed to the individual conventions that have been drafted since those documents were completed?

I agree with Mr. Koh's distinction regarding our time-span. The world trend against protection of human rights may well be reversed in 25 years. But what point would there be to stopping now with vague statements? Specificity will affect nations more radically in 25 years than mere statements of good intent.

Turning to the question of the international counterpart of the U. S. Supreme Court, I would like to divert slightly to take advantage of the opportunity to clear up Mrs. Hauser's misunderstanding. Because officials and courts are what they are, namely, human beings and human institutions, new institutions within countries are needed, not new external institutions. I refer you again to the example of the new domestic institutions in the Scandinavian countries. I hold very little hope regarding an international supreme court. Within ten years, 25 years, or even longer a court will have no effect on serious violations of international law. United Nations "legislation" regarding norms of behavior is fine, and we should continue refining and defining in greater detail the content of human rights. But implementation will have to be internal. A supreme court might be possible, but would be useless unless accompanied with a police power, an attorney general and effective sanctions. As we all know, the United Nations has a proclivity for watering down its legal provisions. Section 2(7) has been reduced to mere peacekeeping efforts. A whole generation of diplomats and lawyers do not even question this result. We must therefore defer hope for a World Supreme Court until we have established institutions of narrower scope, such as international fact-finding bodies, and until we have stimulated more responsive internal institutions. This is the only kind of development that will effect change.

Mrs. HAUSER. First I will respond to the question, what has happened to the human rights petitions received at the United Nations? Do we know the situations of the petitioners in their countries?

When a complaint is received, an official of the Secretariat translates the

document and eliminates the names of the petitioners from the complaint. This is obvious proof of the consequences to the individual of petitioning. It is an important, though disheartening, safeguard. The complaint is then sent to the Ambassador of the petitioner's country. The Commission requests an answer, if the government so desires. So far, every mission contacted has responded. This is an encouraging result. Most missions, of course, deny the allegations. Some governments have attempted to remedy the alleged situation and have reported what efforts they have taken to look into and to effectively deal with the situation. These reports are, naturally, difficult to verify.

In the case of the Russian complaints, a subsequent complaint document was submitted. The names of the petitioners are known through their own publicity efforts. This publicity indicates that the petitioners have lost jobs and scholarships and have been committed to institutions and otherwise punished. Not only is the fate of the individuals in Russia discouraging, but especially disheartening has been the Russian protest to U Thant to prohibit United Nations Information Centers from transmitting petitions to the United Nations authorities. The dispute arose in Russia when the postal and telegraph authorities refused to transmit the petitions to the information center in Russia. Since then, U Thant has directed that United Nations Information Centers may no longer receive human rights petitions. The United States made a mild protest, but did not assert a strong legal argument.

In my opinion, the difference in approach of the various missions stems from the nature of the societies they represent. Among Western nations, the approach is to get the issues on the table, look at them, solve them and conclude the dispute. Among the Third World missions attempts to probe into their societies are considered nefarious and dangerous; their societies are too ill-defined and weak to permit such outside intervention.

Second, I will deal with the question of the need to accompany political progress with new legal institutions. I submit it is not appropriate to analogize internationally from the problems in the United States or from our own legal system. Internationally we are dealing with sovereign states, and this is the key. The consequence of the factor of sovereignty is to create difficult problems of building effective legal mechanisms. International society is based on delicate understandings. The International Court of Justice has long since lost its opportunity to be effective. It is now totally unacceptable and prejudiced by the taint of colonialism.

I agree with Ambassador Richardson that the stimulation of new internal legal mechanisms would be good. I would suggest that this approach be applied on the regional level as well. My guess is that many inflammatory political factors are absent on the regional level, *e.g.*, in the Organization of American States. As evidence of this, we can see quite clearly that the United Nations itself is made up functionally of five regional systems. This is evident in the decision-making of the Secretariat, in the Organization and representation on various sub-organizations. This is accepted and effective because it is clear, for instance, that Western

nations have similar attitudes among themselves, as do African and Asian nations.

Regional efforts can and must develop the law that we now have on the books. The emphasis is shifting, and properly so, away from efforts at treaty-making, and toward efforts at implementing the principles now established.

Chairman NEWMAN thanked the panelists, and asked for remarks from the floor.

Mr. BENJAMIN B. FERENCZ commented that he was new to this area, but had observed that all the speakers dealt with the question of effectiveness in human rights in the same way: they all agreed that the effectiveness of law in this area is minimal. They apparently agree even more closely on the reasons for such ineffectiveness, such reasons stemming from political problems both on the domestic and on the international scene. By reason of his background as a prosecutor at Nuremberg, he has seen that a highly civilized community could be persuaded to accept massive violation of human rights. Should it not be possible to persuade the public to respect human rights? Now that the world is facing up to problems of racial discrimination and has engaged in successful efforts at drafting principles with which to deal with the problems, should we not on the broader plane direct our efforts to the "public relations" as well as the political level? Is it not possible to mobilize scholars and the machinery of the United Nations to a massive sales program, infuse the issues with "sex appeal," and turn to the public to win allies in the international fight for all human rights as well as against racial discrimination?

Mrs. HAUSER agreed wholeheartedly that education is an important part of the United Nations' work. She felt that the United Nations has in fact been quite successful in its educational efforts; even in extremely illiterate areas the people have heard of the United Nations human rights movement. And there has been some response from the governments of the world. The United Nations is increasingly successful in convincing people that they are entitled to rights, that there is a body of law that says so, and that they should press their governments for enforcement of these rights. She suggested that anyone with an effective sales program would be most welcome at the United Nations. The reason she and the other panelists had not dealt with educational and publicity efforts was that today's topic was enforcement.

Ambassador RICHARDSON added his agreement that salesmanship is required. He suggested that efforts outside as well as within the United Nations are needed. He commented that United Nations people are not all government people, citing the International Labor Organization, which he felt has been more effective because it is not composed of purely governmental representatives. He felt that development of pressure both by and on non-government persons would be a useful supplement to the development of internal institutions that he had discussed earlier. He gave his enthusiastic encouragement to all forms of citizens' human rights organizations.

Mr. S. PRAKASH SINHA remarked that, with regard to petitions sent to the United Nations Human Rights Commission, although names supposedly are withheld in its internal procedure, in the Black Panthers' petition the names were widely reported in the press. Did this represent a leak from the United Nations?

Mrs. HAUSER hastened to clarify her earlier statement. The allegations in the petition only referred to the Black Panther Party, and the petition as conveyed to the United States Mission did not contain the signatures of the petitioners. The signers themselves revealed their names to the newspapers, to increase the impact of publicity in America, but the usual United Nations procedures were followed.

Mr. KOH remarked that he was surprised to learn of the United Nations' procedure, since all complaints that his Mission have received have contained the names and addresses of the petitioners involved. His government has tried to respond rationally and reasonably. One consequence has been relief to the complainants. He wondered if this experience has been shared by other members of United Nations Missions.

Dr. EGON SCHWELB agreed with the prevalent sentiment of qualified pessimism and skepticism. However, in view of the long-range goals and the size of the problems to be solved, he felt our discouragement should be tempered by the accomplishments already realized. He responded to Ambassador Richardson's remarks on the Convention on the Elimination of all Forms of Racial Discrimination wherein Ambassador Richardson spoke of structural deficiencies in the convention, citing the number of reservations that had accompanied ratification, some of which he called "arrogant." Dr. SCHWELB stated that the reservations provisions of the convention were stricter than those contained in the Vienna Convention on the Law of Treaties. In the Racial Discrimination Convention, the possibility is provided for two thirds of the states parties to override a reservation; this is not possible under the Vienna Convention. Furthermore, in the European Convention on Human Rights there are no limitations on the right to make reservations to the extent that any law in force in a state's territory is not in conformity with the convention.

Turning to the question of which reservations are "arrogant," Dr. SCHWELB presumed the reference was to the British reservations upon signature and ratification and the American and Italian reservations accompanying signature. These reservations were attempts to bring Articles 2 and 4 of the convention in line with the constitutions of the states involved. One of the British reservations was to the effect that the United Kingdom does not regard the Commonwealth Immigrants Acts of 1962 and 1968, or their application, as involving any racial discrimination and fully reserves the right to continue to apply those Acts. Under the convention the states parties had the right to object to this or any other reservation, but no objections were made by states parties, which include countries in Africa, Asia and Eastern Europe. Dr. SCHWELB did, however, agree that this particular reservation was of rather doubtful compatibility with the object and purpose of the convention. He also noted that the



convention prohibits a reservation that inhibits the operation of any of the bodies established by the convention. In conclusion, he felt that Ambassador Richardson's criticism of the reservations provisions of the convention was not too well founded.

Dr. SCHWELB then replied to the comment that there had been no move in the United Nations with regard to measures against racial discrimination until the entry of large numbers of Third World nations into the United Nations after 1960. The opposite was in fact the truth. United Nations work in the field of discrimination started in 1946. The Sub-Commission on Prevention of Discrimination and Protection of Minorities fought in this cause beginning in 1947. In the 1950's and early 1960's the Sub-Commission initiated and was instrumental in the elaboration of all the great instruments prohibiting discrimination that have come from the United Nations family of organizations. Among those instruments were the International Labor Organization's Discrimination (Employment and Occupation) Convention, 1958, the UNESCO Convention against Discrimination in Education, 1960, and the 1965 Convention on the Elimination of all Forms of Racial Discrimination. The diligent efforts of the Sub-Commission which led to the drafting and adoption of these instruments antedated the entry into the United Nations of the numerous African nations.

Ambassador RICHARDSON replied that he retains his criticism with regard to reservations; he felt no reservations at all should be permitted. He agreed that all reservations to the Racial Discrimination Treaty were not "arrogant," but predicted that more are on the horizon. He said he would suspend judgment until more ratifications have been made.

Second, Ambassador RICHARDSON clarified that he had not claimed there was no "move" until the African representatives to the United Nations increased. But he felt that the Commission's efforts had not achieved success until the needed fuel was added by the entry of the Third World nations. This influx changed the political environment to permit the recent accomplishments in the area of racial discrimination. Without such an improvement in the political environment, he strongly suspected that the quality of legislation would have been reduced and that much of it would not be on the books at all.

Dr. KAYE HOLLOWAY congratulated Mrs. Hauser on a valiant effort to face the dilemma of rhetoric. The "student revolt" today stems from frustration over the "credibility gap." The United States Government should freely admit its difficulties in the area of racial discrimination, and the revolt would have less force. This would free the way for non-governmental institutions to combat discrimination outside of the government.

Regarding Africa and Russia, she remarked that the disaffection apparent today springs from the necessity that discrimination on a deliberate systematic basis as a state policy against large numbers of persons be dealt with before efforts are focused on individual violations. The African nations feel the effort to combat discrimination at the individual level should have lower priority than large-scale group and ethnic discrimination. The African nations are not interested in individual violations when systematic discrimination is permitted.

Again on the African question, Dr. HOLLOWAY felt that a special category is needed because the governments of the African states are presented with the great difficulty of welding nation-states out of conglomerations of tribes and divisions left over from the old colonial administrative lines. Solving these group conflicts in Africa especially should have priority above concern with individual violations.

Dr. HOLLOWAY agreed that the question of reservations is important. She felt that the Vienna Treaty on the Law of Treaties is disappointing in this respect, and congratulated the draftsmen of the Racial Discrimination Treaty on its resolution of the problems of sovereignty. She agreed with Ambassador Richardson that efforts must be made to limit international bodies to enforcement measures compatible with contemporary attitudes toward sovereignty.

Mr. ELI WHITNEY DEBEVOISE lauded Mrs. Hauser as a working idealist who wants results, and suggested that what is needed is not qualified pessimism but a working optimism progressing toward the ultimate goal of international good will. From his position as a member of the International Commission of Jurists he has long advocated establishment of a single High Commissioner on Human Rights who would have more power to remedy violations of the basic human rights than any institution now has. It is important to create an institution to meet the recognized problem of governmental instructions that must be followed by delegates to international organizations. Effective representation is impossible, and a single man should be carefully picked to occupy the position to be above all political pressures. Finally, he added his agreement that the development of individual and regional institutions deserves much greater support than it now receives in the International Human Rights field.

Professor KWANG LIM KOH proposed that the present Human Rights Commission should increase their "watchdog" rôle. Although it may be difficult to promote fundamental human rights throughout the world in the shortest possible period, it may not be too difficult for the Human Rights Commission to maintain the minimum standards of behavior for states in dealing with human rights. For this purpose it may be desirable for the present Human Rights Commission to record annually, at least, the obvious, deliberate, governmental violations of human rights in any nation or nations of the world. The mere fact that the Human Rights Commission records the obvious, deliberate governmental violations annually, may have some restraining effects on the violating nation or nations. The accumulative restraining effects may help the world maintain the minimum standards of fundamental human rights.

Mrs. HAUSER replied that watchdog mechanisms had her full support, although such institutions are difficult to establish for complex political reasons. The first step, of course, is the establishment of fact-finding commissions, and the Committee on the Elimination of Racial Discrimination set up under the Racial Treaty, with its broad fact-finding powers, has been applauded as an important step in this area.

Mrs. HAUSER commented on the remarks of Mrs. Holloway. Mrs. Hol-

loway, as she understood, had alleged that international human rights organizations are too concerned with individual violations when systematic violations of human rights are widespread. No international organization can effectively deal with individuals, Mrs. Holloway apparently felt, and therefore substantial violations by states should be dealt with instead. When one raises the problem of violations of political and civil rights in the African countries the response, apparently, is that these nations are new, they are colonial vestiges, and are composed of tribes. But to assert these factors as excuses for human rights violations does not answer the question.

This dialogue, Mrs. HAUSER felt, exposes a philosophical difference between the Western and the African nations. She related a discussion she had recently had with an African delegate to the United Nations regarding imprisonment of members of political opposition groups in the African countries. This, she felt, was a "gross violation" of political and civil rights. The African delegate responded that to his understanding "gross" means numbers, *i.e.*, thousands of persons, and did not refer to the seriousness of the violation without regard to numbers. Mrs. HAUSER questioned whether her interpretation that "gross" refers to the nature or quality and not to the quantity of human rights violations would be accepted by the Third World nations, preoccupied as they are with their newness and their problems of social integration. This is a difficult position to take with respect to all human beings in all countries. Although *apartheid* is admittedly bad, the problem of individual violations of human rights does not disappear by so asserting.

Professor SIDNEY LISKOFKY commented on the complaint procedure under the Racial Discrimination Convention with regard to state-versus-state disputes. To some extent he shared Ambassador Richardson's conclusion that the South African problem casts serious doubt on the effectiveness of this procedure. But Professor LISKOFKY suggested heavier reliance on Article 15 of the Racial Discrimination Convention which empowers the Committee to receive petitions and to submit opinions and recommendations on these petitions to the United Nations. This provision is curious because it is an agreement by some states to badger another state with regard to situations within its own territory. This may or may not be objectionable, he felt, but this may well become the core for the foreseeable future of implementation of the treaty's human rights standards, since a state-versus-state complaint is unlikely, and no state has accepted the provisions of Article 14 for individual complaints.

Chairman NEWMAN wondered whether the experiment is new to international law, whereby several states empower their own committee to investigate affairs of other countries not represented on the committee.

Ambassador RICHARDSON commented that the development of the Committee's powers under Article 15 was not only probable but highly likely, since the Committee has given high priority to Article 15 in its very first meetings. However, this did not alter his pessimism. First, the thrust of Article 15 disappears when the Trust and Non-Self-Governing Terri-

tories gain their independence. Second, he cited the example of Namibia, which was entrusted to South Africa. When gross violations, under any definition, occurred, the international organizations did nothing. Mrs. Hauser would say that politics is politics, but Ambassador RICHARDSON would say "no comment."

Chairman NEWMAN expressed his fascination with the history of the human rights movement in early, revolutionary America. One of his associates at Berkeley, he related, has researched the debates that preceded the adoption of the Bill of Rights. The arguments then used against their adoption are similar to those being used today against adherence to human rights conventions. For example, Alexander Hamilton stated that liberty in our nation would suffer grievously by the enactment of the Bill of Rights. In 1965 and 1966 we were told that the covenants would never be accepted by the General Assembly, but as it turned out they were adopted in the Assembly unanimously. Again, when the International Commission of Jurists first investigated alleged violations of human rights in Tibet, Brazil, and many other countries, people were highly skeptical; but the Commission now has a distinguished record of achievement even though it has no law to speak of to work with. Finally, concerning the situation in Greece, from May to September, 1967, we were told that it was inconceivable that a second country would file a complaint against Greece. And yet in September, 1967, Norway and other countries filed such a complaint, and in 1969 the European Commission in fact acted on the alleged violations of human rights.

On this optimistic note, Professor NEWMAN thanked the panelists and participants and closed the session.

### Extraterritorial Application of Law

(Sponsored Jointly with the Section of International and Comparative Law,  
American Bar Association)

The session convened at 9:30 o'clock a.m. in the Astor Gallery of the Waldorf-Astoria Hotel. Professor Willis L. M. Reese of Columbia University Law School presided.

## EXTRATERRITORIAL APPLICATION OF LAW —GENERAL PRINCIPLES

*By Henry Harfield \**

This is not the topic on which I accepted to speak. The topic offered to me was "Law in Space" and I regarded that topic as an invitation to speculate on the consequences of an almost infinite proliferation of laws within a very finite area. On that premise I had hoped to relate the topic very

\* Of the New York Bar.

precisely to the history and perhaps to the future of the United Nations. I may do just that.

Although this is a practitioner's panel, conspicuously so labeled, I believe it appropriate to begin with a series of abstractions. If we are to discuss the extraterritorial application of law, it is useful to reach common ground on what law is. Therefore I begin with my observations of the nature of law and the general principles of its application. My fellow speakers may or may not accept the validity of these principles.

Law as we know it is a function of society, for no man can be a law unto himself.

Who to himself is law no law doth need,  
Offends no law, and is a king indeed.

Chapman, *Bussy D'Ambois*, Act II, Sc. 1.

It is only where man meets man that rules of conduct are necessary to their rational existence and well-being. Thus law cannot exist in the absence of a need for social order, and social order cannot exist without law.

Society, in the world in which we live, is a society of nations. Domestically, we are much concerned with civil rights, which is our currently popular trade name for the rules of law that protect the individual against the society in which he lives and which insure the sovereignty of the individual. In jurisprudence, however, the concept of sovereignty long antedated the concept of individual human right. It was and is a concept of the independence of each sovereign group of social human animals from each other comparable group; and an essential attribute of sovereignty is that the law of the particular social group or political unit is paramount within that group or unit, not only in respect of the individuals who make up the group but also in respect of the law of any other group or unit.

In pure theory, law need not be related to territory. Law is a rule to govern the contact of individuals with one another so that it relates to persons rather than to places. Thus, it is logically acceptable for two distinct groups of persons, occupying the same territory, to be governed by entirely separate rules of conduct. Logic is acceptable, however, only so long as, and to the extent that, the separate groups avoid contact with one another. Once contact is established it becomes impossible to avoid the establishment of territorial connotations. Whenever in history separate groups with separate laws have occupied the same territory, it has become essential that a new body of rules be devised that is the law of the land. Experience indicates as a fact, therefore, that law is a function of society and that society is pragmatically related to a territorial or spatial definition.

Law cannot exist without sovereignty; sovereignty cannot exist without territorial power and independence. There is no such thing as "the law"; there is the law of the Medes, and there is the law of the Persians, and it has been said that there is the law of God and the law of the jungle. From this factual basis, it is easy to speculate as to law in space, but no premise is provided for a discussion of the extraterritorial application of law, when law itself must exist primarily as a territorial imperative.

When the United Nations Charter was adopted, some 50 nations were represented in the General Assembly. In that same era, a quarter-century ago, the delegates who flew from Paris to New York via Gander, spent at least 12 hours in the air. Today, there are more than 125 nations represented in the General Assembly. The flight from Paris to New York is non-stop and takes less than eight hours; it will be further reduced by supersonic transport. The short of the matter is that the compression of time is accompanied by an expansion of nationalism; there are more lawmakers and less space. When there are more sovereigns and closer contacts, when there is more law and less space, the problem is focused as the unhappy reverse of the old English refrain "The more we are together, the happier we shall be." In our crowded, complex world, Swiss watchmakers offend American legislators; New York's coffee importers offend Brazilian legislators; Idaho housewives are injured because of motor vehicles imperfectly manufactured in Japan. There is an endless and endlessly increasing agenda of conflicts between nationals of two or more nations and between sovereigns and the citizens or subjects of other sovereigns. The jurisprudence of these problems is generally, and rather accurately, known as conflicts of law; it is a function of law in space; and it must necessarily be dealt with on municipal levels because there is no effective supra-national tribunal to declare a law that will resolve the conflict of laws.

To discuss the extraterritorial application of law is to beg these fundamental questions, but it is also to raise questions that are intimately connected with the broader issues and that can be resolved only by the application of touchstones that are fundamentally philosophical.

One is inevitably driven back to the proposition that law cannot exist in a vacuum. It is a rule of conduct and it cannot exist as law unless there are people to whom it is addressed and upon whom it is obligatory. It is this obligatory character that distinguishes rules of law from principles of ethics. The difference between law and ethics, that over the centuries has tended to be obscured, should be emphasized. Ethical precepts belong in the area of morality but law is an amoral political creation. Ethics should have no relation to places, but it is virtually impossible to describe a law without territorial reference. The Golden Rule is an ethical statement. The rule against perpetuities is a political statement operative in defined territories. The law of gravity is effectively applied on a global basis.

Morality encompasses all mankind, wherever situated, but politics is necessarily confined to the territory of the political unit. It therefore appears possible, as an exercise in pure logic, to demonstrate that a given law, that is to say, a rule of conduct for the members of a particular political unit, has no existence beyond the confines of that particular unit. In consequence, one might say that there can be no extraterritorial application of law because the rule to be applied does not exist, as law, beyond the boundaries of the sovereignty that made it. In the real world, however, laws are applied extraterritorially. Indeed, the modern syndrome of more laws in less space makes the extraterritorial application of national laws a necessity that is frequently also desirable.

I conceive the purpose of this morning's discussion to be a critical examination of the phenomenon of extraterritorial application of law. My function is to discuss the anatomy of this phenomenon; the succeeding speakers will deal with its physiology as observed in the light of decided cases. On this basis, I have put forward my speculations as to the nature of law, and now move to a division of the narrow subject into two major categories: (1) the importation of foreign law and (2) the exportation of domestic law.

The first is best illustrated by a litigation in which the courts of the forum determine that the rights of the parties are or should be governed by the laws of a different political unit. In that case the judgment in the forum represents an application of foreign law; it is an extraterritorial application of governing foreign law.

It is not easy to find a single comprehensive illustration of the second category—the exportation of domestic law. A nation may, for example, adopt as its fundamental law a rule that wagering contracts are null and void regardless of where they are made or where they are to be performed or by whom they are made. It seems clear, in the present state of jurisprudence, that no other nation would regard such a rule as being “law” within its own territory. Accordingly, unless the lawmaking nation is desirous and capable of enforcing its will throughout the world by force, that law will not be applied and has no effect outside the territory of the lawmaking nation. If, however, the parties to the wagering contract come within the jurisdiction of the lawmaking nation, the result may be different. If the parties to such a contract are both within the lawmaking jurisdiction and the courts of that country require that monies paid under the contract be restored to the payor, it can be said that the law had extraterritorial effect.

We have seen numerous instances in which a national decree or law is precisely intended to take effect beyond the territorial limits of that country. It often happens that the expropriation of property interests, lawful where it occurs, is intended to affect property situated beyond the territorial confines of the expropriating power. Generally speaking, the courts in the United States have refused to apply foreign law if it is of a penal or fiscal character or otherwise offends our public policy. On the other hand, various State and Federal statutes are designed with precisely the opposite result in mind. For example, a modern merger statute ordinarily provides that all of the property of the merging corporation, without regard to its situs, is transferred by operation of law to the receiving corporation. It would be startling indeed to suggest that a transfer of title thus effected should be denied effect in the foreign country where the property is situated. Yet, if effect is given, there is a clear illustration of an extraterritorial application of law.

The thesis is, then, that laws necessarily have an extraterritorial effect in the world we live in today, but to say that laws have extraterritorial effect does not lead inevitably to the conclusion that they can or should have extraterritorial application as law. For example, a United States citizen may be required by law to take action in a foreign country that is forbidden

by the laws of that country. If he does so act, the United States law has had extraterritorial effect. If he is punished for his action in violation of the foreign law, the United States law has been denied extraterritorial application.

The test that I suggest for a determination of the proper extraterritorial effect and acceptable extraterritorial application is based upon sovereignty. Ordinarily, where a tort or a breach of contract has occurred abroad, the courts of the forum having jurisdiction of the parties will provide relief to the aggrieved party in accordance with the law of the place where the tort occurred or the contract was to be performed. Ordinarily where a crime has been committed abroad, the courts of the forum, notwithstanding jurisdiction of the parties, will not provide relief to the aggrieved party or society. In each instance, the conduct complained of occurred abroad within the territory of the sovereignty that had the right and power to prescribe rules of conduct. Thus, in each case the foreign law was conceived as territorial law and the attempt to give it extraterritorial effect by application in the forum in no way erodes, but rather emphasizes, the sovereignty of the forum. The foreign state recognizes that its law is inapplicable and ineffective in the country of the forum, except insofar as that country is prepared to import the foreign law by way of judicial assistance. Where, on the other hand, the foreign law purports to affect conduct or property that occurs or lies beyond its territory, that is an impermissible attempt to export the law; by its very nature it invades the territorial sovereignty of the nation where the conduct occurs or the property is situated; and it is not entitled to, and will not ordinarily receive, extraterritorial application.

There remains one area to discuss. Where a country enacts a law that is intended to regulate conduct beyond its boundaries, that country is capable of enforcing its extraterritorial law by punishment or other constraint of the acting party if and when it can catch him. This is, I suggest, an exercise of sovereignty and one that clearly diminishes the sovereignty of the country where the proscribed conduct occurred. It is an exercise of sovereignty that I regard as reprehensible, but it is a fact and it is an attribute of sovereignty.

Within the Federal framework of the United States the Constitution prevents this kind of sovereign brutality and guarantees, through the full faith and credit clause, the availability of judicial assistance where sovereign power is properly exercised. In the unfederalized framework of the planet Earth, there are no such guaranties.

Accordingly, in our consideration of the extraterritorial application of law, which is a territorial political concept to be distinguished from morality, we are obliged to seek morality as a guide. In a community of sovereign nations, linked by heavy traffic of persons, property and ideas, it is essential that laws be given extraterritorial application in proper cases and that they be denied extraterritorial application in improper cases. In a community of sovereign nations, the issue of propriety can only be resolved by consent.



There is no such thing as international law in the sense that law implies obligation.

The solution is to establish a code for the resolution of questions of conflict of laws. That code cannot be Draconian. It can exist only as a multilateral treaty among consenting sovereigns. The development of that code requires the initiative and continuing good offices of an international organization. It presents a challenge that the United Nations can properly accept.

## LIMITS IMPOSED BY INTERNATIONAL LAW ON REGULATION OF EXTRATERRITORIAL COMMERCIAL ACTIVITY

*By Isaac N. P. Stokes\**

Broadly stated, my question is: How far does international law permit a state to go in regulating commercial activity outside of its territory which has effects within the territory?

To borrow Mr. Harfield's apt expressions, I will deal with the exportation of domestic law rather than the importation of foreign law. I agree with him that questions regarding the application of foreign law—its importation so to speak—are generally governed, not by international law, but by the rules of choice of law which make up the body of law known as "conflicts of law." These rules are generally, though not always,<sup>1</sup> within the exclusive competence of the state whose forum has to make the choice. But when it comes to the export of law—the application by a state of its own law to conduct outside its territory—there are very real limits imposed by international law, which states are legally obliged to observe.

The first and most important test of the validity under international law of state action regulating conduct is whether the state has jurisdiction with respect to the conduct involved. This is, of course, not the only test where the application of law to aliens is involved. There is a large body of international law concerned with the responsibility of a state for injuries to aliens arising out of legal proceedings where its jurisdiction is unquestioned.

Of the generally recognized bases of jurisdiction, the territorial basis and to a lesser extent the nationality basis are the only ones that concern us here. Subject to certain exceptions,<sup>2</sup> international law recognizes that these bases give a state jurisdiction to regulate the conduct of anyone in its territory and to regulate the conduct of its own nationals anywhere.

But these principles do not tell us whether and when a state can regulate

\* Of the New York Bar.

<sup>1</sup> See *Serbian and Brazilian Loans Cases*, P.C.I.J., Ser. A, No. 20/21 at 41 (1929); *Am. Law Inst. Restatement (2d)*, *Foreign Relations Law of the U. S.* (1965) § 19.

<sup>2</sup> In situations such as those of foreign vessels in innocent passage through territorial waters, visiting military forces, diplomatic and consular representatives and premises, and international organizations, international law imposes certain restrictions on the exercise of territorial jurisdiction. See *Restatement*, note 1 above, Part I, Chs. 3 and 4.

the conduct of an alien abroad that takes effect within its territory. The classic textbook example is that of the murderer who shoots across an international boundary. Everyone agrees that the state where the shot takes effect has jurisdiction to try the offender. This principle, often called the "objective territorial principle," is sometimes justified on the fiction that part of the criminal conduct actually occurs in the territorial state, but I think it is more accurately stated in terms of conduct abroad taking effect within the territory.

The leading case applying this principle is the decision of the Permanent Court of International Justice in 1927 in the matter of the *Lotus*, where a Turkish ship was sunk on the high seas by collision with a French vessel. Regarding the Turkish vessel as Turkish territory, the Court held that Turkey did not violate international law by trying the French officer alleged to be responsible. The Court deemed consistent with international law the practice of states

which . . . interpret criminal law in the sense that offenses, the authors of which at the moment of commission are in the territory of another State, are nevertheless to be regarded as having been committed in the national territory, if one of the constituent elements of the offense, and more especially its effects, have taken place there. (Case of the S. S. "Lotus," P.C.I.J., Ser. A, No. 10 (1927) at 23.)

Apart from questions as to how far a vessel on the high seas should be assimilated to the territory of the state whose flag it flies, the rule of the *Lotus* case still seems to be good international law.<sup>3</sup> But obviously the territorial state does not have jurisdiction with respect to all extraterritorial conduct taking effect within its territory. For example, if a victim of the collision had survived for several months and eventually died of his injuries in a third state to which he had gone for treatment, no one would contend that this state had jurisdiction to try the negligent navigator.

The line between extraterritorial conduct and territorial effect must be drawn somewhere. The criteria for drawing it are far from settled, especially where business regulation is concerned. The first case applying the *Lotus* rule in the field of antitrust was the famous *Alcoa* decision of the Second Circuit in 1945, where a Canadian corporation was held to have violated the Sherman Act by entering into agreements outside the United States to restrict exports to the United States. Speaking for the court, Judge Learned Hand, though not citing *Lotus*, stated the rule broadly:

it is settled law . . . that any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends. . . . (U. S. v. Aluminum Co. of America, 143 F.2d 416, 443 (2d Cir., 1945).)<sup>4</sup>

The decision started a controversy that has been going on ever since. There have been a number of other cases applying the same broad principle

<sup>3</sup> As to collisions on the high seas, see Art. 11 of the Convention on the High Seas.

<sup>4</sup> A later passage in the opinion apparently confined the rule to intended territorial effects. *Ibid.* 444.

to restrictive business practices abroad that affect U. S. commerce.<sup>5</sup> But the principle has been criticized as contrary to international law because it imposes U. S. law on the conduct of aliens in foreign nations regardless of such nations' own laws. Critics have pursued two lines of argument: first, that territorial jurisdiction extends only to conduct that occurs, at least in part, within the territory, and secondly, that if territorial jurisdiction does extend to extraterritorial conduct having territorial effects, this is true only of commonly recognized crimes or torts.

The first argument proves too much. It must either reject the *Lotus* rule in situations where its validity is unquestioned, such as fraud by use of international mails,<sup>6</sup> or resort to the fiction that the territorial effects are part of the conduct abroad, a fiction that could likewise be applied to antitrust violations.

The second argument is more appealing, because it would generally preclude a state from penalizing conduct that is lawful where it occurs. But the test of the "commonly recognized crime or tort" seems too restrictive. It confronts a state that is developing new law to meet new conditions with the risk of frustration of such law through foreign activities taking effect within its territory. Antitrust law is not the only area where this may be important. Other examples are new rules of law imposing liability, sometimes regardless of fault, on producers of defective products that cause personal injuries or on persons conducting industrial operations that cause environmental damage.

Nor does the United States stand alone in asserting jurisdiction with respect to restrictive business practices abroad that affect its commerce. The antitrust law of West Germany applies by its terms "to all restraints of competition which have effect in the area in which this Act applies, even if they result from acts done outside such area,"<sup>7</sup> and, in its *Dyestuffs* decision of last year, the Commission of the European Communities imposed fines on British and Swiss corporations, apparently without reference to the location of their activities, for price-fixing activities that affected trade within the Common Market.<sup>8</sup>

Nevertheless, as I have already indicated, the line between extraterritorial conduct and territorial effects must be drawn somewhere. One effort to do this which has attracted a good deal of attention is Section 18 of the American Law Institute's *Restatement of the Foreign Relations Law of the United States*.<sup>9</sup> Having participated in drafting it, I may perhaps be forgiven for taking a little of your time to analyze its provisions. I hasten

<sup>5</sup> For cases and comments see Restatement (note 1 above) 54; Common Market and American Antitrust: Overlap and Conflict (Rahl, ed.) 50-90 (1970).

<sup>6</sup> *The King v. Godfrey*, [1923] 1 K.B. 24 and other cases cited in Restatement (note 1 above) 55.

<sup>7</sup> Act Against Restraints of Competition, § 98(2), as translated in Rahl, note 5 above, at 111.

<sup>8</sup> IV/26,267—Dyestuffs; 8 Int. Legal Materials 1330 (1969); CCH Comm. Mkt. Rep. ¶ 9314.

<sup>9</sup> Note 1 above.

to add that, insofar as I may go beyond the wording of the *Restatement*, I speak entirely for myself and not for my fellow Reporters or the American Law Institute.

The *Restatement* rule says that the territorial state has jurisdiction to regulate extraterritorial conduct if the conduct and its effect within the territory "are generally recognized as constituent elements of a crime or tort under the law of states that have reasonably developed legal systems." This much is non-controversial. But the *Restatement* goes on to say that the territorial state also has jurisdiction if each of four other tests is satisfied.

First, the conduct and its effect "must be constituent elements of activity to which the rule applies." Suppose, for example, that producers in State A agree to fix the price of their exports of a raw material to State B. Consequently a purchaser in B, who uses the material to make a product exported to State C, is forced to raise his prices. The laws of both B and C forbid price-fixing. As far as this test of the *Restatement* rule is concerned, B has jurisdiction to apply its law, but C does not.

The second test is that the effect within the territory must be "substantial." This is obvious and requires no illustration.

Thirdly, the territorial effect must "occur as a direct and foreseeable result" of the conduct abroad. Suppose a consumer in State A agrees to buy a commodity only from a single dealer there, who does no importing. As a result, the consumer stops buying from another dealer in A who imports from State B, thus reducing B's exports. The law of B forbids exclusive dealing contracts that affect B's domestic or foreign commerce. The test is not satisfied, because the effect in B's territory is too remote. Another example might be a rule of the territorial state imposing liability, regardless of negligence, on producers of defective goods that cause personal injuries. If a foreign producer exports directly to the territorial state, the test is satisfied. If he exports only to a third state, and the product is designed primarily for use there but is also re-exported by an independent dealer to the territorial state, the test is probably not satisfied.

Finally, the *Restatement* requires that the rule of law which the territorial state seeks to impose on conduct abroad causing effects in the territory must not be "inconsistent with the principles of justice generally recognized by states that have reasonably developed legal systems." This is a sort of substantive due process clause. It recognizes that the law of the territorial state must not be too far out of line with what is generally regarded as reasonable regulation. Suppose, for example, that a participant in a radio forum abroad, knowing that the program can be heard in the territorial state but is not primarily intended for listeners there, criticizes certain actions of its government. A law of the territorial state imposing criminal liability for this act of free speech would be beyond its territorial jurisdiction.

Each of these four tests is pretty vague, especially the last, and they will often overlap. I am sure the wording of the *Restatement* rule can be improved and its substance made more precise, in the light of experience, but I believe that, in the present unsettled state of the law, the rule repre-

sents a good guess as to the line that would be drawn if the issues were to be submitted to international adjudication.

Territorial jurisdiction is not always exclusive. Where conduct in one state has effects in another, both of them may have territorial jurisdiction. Moreover, even where a person's conduct and its effects are confined to the territory of a single state, but the person is an alien, both the territorial state and the state of nationality have jurisdiction to regulate his conduct. Where two states have jurisdiction with respect to a person's conduct, international law does not necessarily preclude one state from compelling violation of the other's law.<sup>10</sup> A state may, for example, order a national residing abroad to return for military service. Yet the foreign state, having imposed military service as a condition of residence, may prevent his departure by drafting him into its own forces.

In the area of business regulation, the problem of inconsistency between the laws of overlapping jurisdictions is especially troublesome when enforcement measures such as injunctions or subpoenas to produce documents call for action or inaction abroad that would, according to the respondents, expose them to criminal or civil liability under applicable foreign law. These situations are not confined to cases where U. S. jurisdiction is asserted on the basis of the effects of conduct abroad on U. S. interstate or foreign commerce. They are more apt to arise with respect to foreign companies doing business here or American companies with foreign subsidiaries. There have been some pretty strenuous objections from foreign governments claiming that the United States was violating international law by regulating conduct in their territory. So far there has not been a real showdown. As far as I am aware, no final court judgment has required conduct abroad that would be in clear violation of foreign law or that would clearly result in civil liability under foreign law. However, these cases have generated a good deal of unfortunate international friction. Probably the most famous is the *Swiss Watch Case*, where the situation was saved only by modification of the judgment following active intervention by the foreign government.<sup>11</sup>

Where states have overlapping jurisdiction, international law does impose some restraints on the enforcement of inconsistent laws. Some of these are indicated in Section 40 of the *Restatement*, which says that each of the states "is required by international law to consider, in good faith, moderating the exercise of its enforcement jurisdiction" in the light of various specified factors. Unfortunately, this rule gives no assurance that the courts of the two states will reach the same result in trying to apply it. Exposure to inconsistent laws is often an inescapable risk of international business transactions, but there should probably be a presumption in favor of the law of the territory where the conduct occurs.

It is to be hoped that court decisions and international agreements, as

<sup>10</sup> Restatement, note 1 above, § 39.

<sup>11</sup> *U. S. v. Watchmakers of Switzerland Information Center, Inc.* (S.D.N.Y., 1962), 1963 Trade Cas. ¶ 70,600, order modified, 1965 Trade Cas. ¶ 71,352; discussed at length in Rahl, note 5 above, Ch. 6.

suggested by Mr. Harfield, will set more precise limits on the exercise of overlapping jurisdiction with respect to business activity. Much has already been accomplished in the tax field, both by legislation affording credits for foreign taxes and by international agreements providing relief from double taxation.

Less formal arrangements are also helpful. An example is the joint statement of the United States Attorney General and the Canadian Minister of Consumer and Corporate Affairs, which was announced last November, setting forth an understanding for mutual consultation with respect to enforcement in antitrust cases having international concern.<sup>12</sup>

A state can sometimes take effective unilateral action to prevent what it regards as foreign encroachment on the regulation of business activity. An interesting example is the *Fruehauf* case, where, in compliance with a U. S. Treasury order, the managers of a U. S.-controlled but partly French-owned company were about to make it repudiate a profitable contract with one of its major French customers for truck trailers destined for Communist China. To protect the French shareholders and employees, the French court approved the appointment of a temporary administrator so that he could take over the management and perform the contract.<sup>13</sup>

Legislation has also been enacted for similar purposes. The Netherlands Economic Competition Act of 1956 provides that in the absence of permission from the competent Netherlands authorities

it shall be forbidden to comply deliberately with any measures or decisions taken by any other State, which relate to any regulations of competition, dominant positions or conduct restricting competition. (§39.1 as translated in OECD Guide to Legislation on Restrictive Business Practices, Netherlands. See Rahl, note 5, above, at 121.)

Less sweeping laws have been adopted by other states. On at least one occasion, the *British Nylon Spinners* case, a foreign court has specifically ordered performance of a contract that had been outlawed by an American antitrust decree, thus bringing the case within a saving clause in the decree which specified that it did not call for violation of foreign law.<sup>14</sup>

So far, it is the extraterritorial enforcement of United States antitrust laws that has given rise to most of the controversy, but it is worth noting that American corporations may well find themselves complaining of similar actions by other nations. For example, an American export association enjoying U. S. antitrust exemption under the Webb-Pomerene Act<sup>15</sup> might find itself charged with violation of the antitrust laws of the European Common Market, as were the British and Swiss respondents in the *Dyestuffs* case.

In conclusion, and to summarize very broadly, we can say that international law permits a state to regulate business conduct abroad that inter-

<sup>12</sup> 8 Int. Legal Materials 1305 (1969).

<sup>13</sup> *Fruehauf Corp. v. S. A. des Automobiles Berliet* (Ct. App. Paris, 1965), 85-2 Gazette du Palais; 5 Int. Legal Materials 476 (1966).

<sup>14</sup> *British Nylon Spinners, Ltd. v. Imperial Chemical Industries, Ltd.*, [1953] 1 Ch. 19.

<sup>15</sup> 40 Stat. 516, 15 U.S.C. §§ 61-65.

feres with its domestic or foreign commerce or has other adverse effects within its territory, but that there are limits on this extraterritorial reach of national law, many of which can at present be defined only in very general terms. As industrial and commercial activities expand, and national regulation becomes more extensive, we can expect an increase in the overlapping of laws. This seems especially true in the relatively new and rapidly developing field of environmental law. To keep complications to a minimum, it is important that business men get competent advice as to foreign law, that enforcement agencies exercise reasonable self-restraint, and that governments and international organizations seek international agreements that will fill some of the many gaps in the applicable international law.

### EXTRATERRITORIAL APPLICATION OF LAW: UNITED STATES SECURITIES LAWS

*By P. A. Bator \**

The preceding speaker has outlined in general terms the considerations which apply in determining whether in a particular case international law permits a state to regulate commercial activity outside its territory which has effects within the territory. I would like to take a few minutes to apply his question to a more limited area of business law and to discuss the extent to which the United States has applied—and under international law may apply—its securities laws, and in particular the Securities Exchange Act of 1934, to securities transactions occurring and persons residing outside the United States.

It is accepted wisdom that as the world of commerce becomes increasingly international or transnational, it becomes more important for nation states to exercise restraint in the application of their regulatory powers to activities which overlap borders. I take it that the rules of international law described by Mr. Stokes are indeed intended to establish criteria which embody such restraints. Unfortunately, in the securities law area, it cannot be said that our own governmental bodies—legislative, administrative or judicial—have given more than superficial recognition to these tenets of international law. In fact, what little experience we have had in this field would indicate that the attitude of the United States has been one of pride, if you will, in the fact that, as in the days of the British Empire, the sun never sets on a transaction in securities over which the asserted beneficial protection of our securities legislation does not extend.

Let me take, as my principal example, the amendments to the Securities Exchange Act of 1934 adopted by Congress in 1964 and the rules proposed for adoption by the Securities and Exchange Commission (SEC) in connection therewith. Until 1964 many of the provisions of the 1934

\* Of the New York Bar.

Act, including the requirement of registration, applied only to companies which had listed their securities on a U. S. stock exchange or had publicly offered securities in the United States. The Act was amended in 1964<sup>1</sup> to extend many of its reporting and other requirements to all corporations whose securities are traded by use of the mails or any instrumentality of interstate commerce and which have total assets exceeding \$1 million and at least 500 stockholders. The amendment was clearly intended to apply to foreign corporations, since the SEC was given specific authority to exempt securities of foreign issuers if it found such exemption to be in the public interest and consistent with the protection of investors.<sup>2</sup>

Let us stop there and analyze the legislative assertion of jurisdiction under principles of international law. It is clear that under this amendment a foreign corporation, with no United States assets, with no activities in the United States, with only a few United States shareholders (who, of course, could have acquired their shares in foreign markets without the participation or even the knowledge of the foreign corporation) could theoretically be subjected to the reporting and proxy requirements of the 1934 Act, and even to the punitive provisions of Section 16(b) (relating to short swing profits) so long as it had sufficient assets and number of shareholders—whether within or without the United States—and so long as any of its shares—whether with or without any action on its part—are traded within the United States. Surely such assertion of applicability of domestic law to foreigners or foreign transactions is inconsistent with the criteria outlined by Mr. Stokes.

It is, of course, true that the Securities and Exchange Commission, by regulation (which can be withdrawn or changed at any time), has limited the most extreme consequences of the legislation. However, you may remember that the SEC rules, as first proposed in 1965,<sup>3</sup> in some respects went almost as far as the legislation permitted. For example, under the proposed rules, a Canadian corporation doing no business in the United States, having undertaken no affirmative act to sell its securities or to list its securities here, but which happened, through no affirmative act of its own, to have 300 or more U. S. shareholders, would have become subject to the requirement to register, to the proxy rules, and even to Section 16(b). Thus, if a Canadian director of this Canadian company had within a six months' period bought and sold in Canada the stock of his company at a profit—perfectly legal, I understand, under Canadian law—the proposed SEC rules would have purported to give the Canadian corporation (and, derivatively, its stockholders) the right to recover the profit, with the sole U. S. contact being the fact that 300 U. S. residents had happened to ask their brokers to purchase for them in Canada stock of this Canadian company. If that is not "export" of our laws in violation of international law, I do not know what is.

<sup>1</sup> 78 Stat. 565 (1964).

<sup>2</sup> See Sen. Rep. No. 379, 88th Cong., 1st Sess. 94 (1963); H. R. Rep. No. 1418, 88th Cong., 2d Sess. 11 (1964).

<sup>3</sup> Securities and Exchange Act of 1934, Releases Nos. 7746-49, Nov. 16, 1965.



Happily, as a result of rather massive protest, including, I believe, the intervention of various foreign governments, the rules as adopted proved somewhat more restricted. However, it should be recalled that this is still an "act of grace" by the Securities and Exchange Commission, which under the Act has the theoretical power to extend its regulatory jurisdiction in the way outlined above.

Let me turn briefly to some litigation in this area to see whether our judges have been more restrained in their application of our securities laws to foreigners or foreign transactions. There are not many cases in this area—certainly the most important being the *Schoenbaum* case, which was decided in 1968.<sup>4</sup> That case concerned Banff Oil Ltd., a Canadian corporation, all of whose business operations took place in Canada. Its only contact with the United States was that its stock was listed and traded on the American Stock Exchange. Banff was controlled by Aquitaine Company of Canada, another Canadian company which in turn was the subsidiary of a French governmental agency. In early 1965, to finance drilling activity, Banff in Canada sold to Aquitaine 500,000 shares of its stock at the then current market price. Somewhat later, Banff also sold 270,000 shares of its common stock at the then current market price to a Luxembourg bank. The sale was negotiated by a U. S. affiliate of the Luxembourg bank, the offer to buy the shares was mailed to Banff from New York and the delivery and payment took place in Canada.

Both transactions were attacked in a derivative suit (on behalf of Banff) brought by a U. S. stockholder of Banff in the United States District Court against Aquitaine, the U. S. affiliate of the Luxembourg bank and certain Banff directors. Plaintiff charged that the transactions which I have described violated Section 10(b) of the Securities Exchange Act of 1934 and Rule 10(b)-5 thereunder, alleging that there was a conspiracy to defraud Banff by causing Banff to sell treasury shares at the market price, at a time when the defendants had undisclosed insider information which made the shares worth a great deal more.

On motion for summary judgment, the District Court for the Southern District of New York dismissed the action.<sup>5</sup> Among other reasons, the court gave the following:

Accordingly, the papers submitted permit no other inference than that a Canadian corporation was allegedly defrauded by its principal shareholder, also a Canadian, the fraud being executed and consummated outside of the United States. The one United States contact present is Banff's listing on the American Stock Exchange. However, the fraud alleged has nothing to do with Banff shares traded on the American Exchange. The exchange facilities were irrelevant to the transaction complained of.

Absent the presence of an extra-territorial function in the Exchange Act, these United States contacts are too insubstantial to warrant application of section 10(b) to this Canadian transaction. Our interpreta-

<sup>4</sup> *Schoenbaum v. Firstbrook*, 405 F.2d 200 (2d Cir., 1968), aff'd. *en banc*, 405 F.2d 215 (2d Cir., 1968); digested in 64 A.J.I.L. 175, 177 (1970).

<sup>5</sup> 268 F. Supp. 385 (1967); digested in 62 A.J.I.L. 502 (1968).

tion of the statute and its purpose as applied here make inapplicable any such extra-territorial test.

\* \* \* \* \*

We recognize that choice of law principles are not determinative as to whether Congress intended the Exchange Act to have extra-territorial effect. However, the reluctance of one state to interfere with the obligations a sister state has imposed on a corporation, its directors and shareholders, is strengthened when the problem is that of one country imposing its standards of corporate behavior on another. . . .<sup>6</sup>

On appeal, the Court of Appeals reversed in a decision by Judge Lumbard which was subsequently affirmed by the court sitting *en banc*. He found in the Exchange Act a Congressional intention "to protect domestic investors who have purchased foreign securities on American exchanges and to protect the domestic securities market from the effects of improper foreign transactions in American securities."<sup>7</sup> While the court noted that Banff stock was listed, there was no real analysis of the relationship of the listing to the fraud complained of.

In our view, neither the usual presumption against extraterritorial application of legislation nor the specific language of Section 30(b) show Congressional intent to preclude application of the Exchange Act to transactions regarding stocks traded in the United States which are effected outside the United States, when extraterritorial application of the Act is necessary to protect American investors.

\* \* \* \* \*

Similarly, the anti-fraud provision of § 10(b), which enables the Commission to prescribe rules "necessary or appropriate in the public interest or for the protection of investors" reaches beyond the territorial limits of the United States and applies when a violation of the Rules is injurious to United States investors. . . .<sup>8</sup>

Time limitations will not permit, I am afraid, a detailed analysis of the case, nor of the *Roth* and *Fontaine* cases, which are also relevant to our discussion.<sup>9</sup> However, it would seem doubtful that in *Schoenbaum* the facts support the broad application of the securities laws of the United States announced by Judge Lumbard, in the light of the principles discussed by Mr. Stokes. Certainly no consideration was given to the principles contained in Section 40 of the *Restatement of Foreign Relations Law* which were outlined by Mr. Stokes. I conclude by suggesting renewed attention to what I referred to as accepted wisdom at the beginning of my speech, namely, the importance of restraint in the application of our laws as commercial activity becomes increasingly international and transnational.

<sup>6</sup> 268 F. Supp. at 391-392, 393.

<sup>7</sup> 405 F.2d at 206. There is nothing in the decisions which would indicate that this particular plaintiff did, in fact, purchase his shares on the American Stock Exchange rather than in Canada.

<sup>8</sup> 405 F.2d at 206.

<sup>9</sup> *Roth v. The Fund of Funds, Ltd.*, 279 F. Supp. 935 (S.D.N.Y.), *aff'd*, 405 F.2d 421 (2d Cir., 1968), *cert. denied*, 394 U. S. 975 (1969); *Fontaine v. Securities and Exchange Commission*, 259 F. Supp. 880 (D. Puerto Rico, 1966).

Mr. HARFIELD asked the panel members for any comments they might care to make on the distinction between "custom of trade" and "international law."

In reply, Mr. STOKES said a distinction should be drawn between acts of nations that are in violation of public international law and acts which are reprehensible, and hence contrary to the "custom of trade," but not illegal. He saw an analogy in the area of constitutional law where many legislative acts may be unwise and unfortunate, but not unconstitutional.

Mr. BATOR said that the comments of Mr. Stokes had particular application to the area of commercial law. There are many situations where, without violating public international law, a nation can apply its law to foreign facts and to foreign citizens. In these areas, the only restraint upon a nation is its own sense of what is right and proper. In Mr. BATOR's opinion, the more powerful a nation, the greater should be its restraint. He felt his last remark was particularly applicable to the United States.

The CHAIRMAN indicated that the time had come for discussion from the floor.

Professor V. C. GOVINDARAJ asked the panel what, in their opinion, was the jurisprudential basis of private international law (conflicts of law) and public international law.

Mr. STOKES said that whereas public international law placed restrictions upon the conduct of nations, private international law did not do so except to the extent that some of its areas may be regulated by public international law. Subject to this one restriction, a state is free to apply whatever choice-of-law rules it desires.

Mr. HARFIELD added that, in his opinion, the jurisprudential basis of private and public international law is not at all clear and can only be the subject of speculation.

Dean MAXWELL COHEN explained at some length how Canada has suffered from the application by American courts of the United States law to facts and persons in Canada. He stressed the need for consultation between Canada and the United States to prevent further unfortunate developments along this line.

In response to a question from Professor Cardozo, Mr. BATOR said that an American court should apply the criteria mentioned in §18 of the *Restatement of the Foreign Relations Law of the United States* in determining when to give extraterritorial application to the securities regulations of the United States. Instead, these courts have come close to saying that United States securities regulations can properly be applied to a foreign corporation whenever stock in this corporation was held by a United States citizen. Such a result would, in Mr. BATOR's opinion, lead to an intolerable situation of overlapping jurisdictions. He reiterated the view that an American court should exercise restraint in applying United States law to foreign facts and to foreign nationals.

Mr. HARFIELD expressed the view that considerable mischief had been caused in the area of jurisdiction by the courts' reliance upon the concept of "reasonableness." Use of this concept is tolerable in the United States only

by reason of the fact that there is one tribunal, namely, the Supreme Court of the United States, to which appeals can be taken. There is no such tribunal in the international area and hence, in Mr. Harfield's opinion, the concept of reasonableness cannot be appropriately used in that area to decide jurisdictional questions.

Mr. WALTER S. SURREY pointed out that there has been some co-operation between the United States and Canada with respect to the extraterritorial application of law. He inquired whether one should be shocked by application of U. S. securities regulations to a corporation which has listed its securities on an American stock exchange.

In reply, Mr. BATOR said that he would not be shocked by such a result. He pointed out, however, that the language of the courts would seem to indicate that they are prepared to apply U. S. securities regulations in situations where a foreign corporation has not listed its securities on an American stock exchange.

Mr. STANLEY FARRAR inquired whether the Fruehauf Corporation could properly be held liable under the United States law by reason of the fact that its subsidiary had been compelled by the French court to ship commodities to Communist China. He also inquired whether the outcome would be different if the French court had not acted but the subsidiary nevertheless sent the goods to China.

Mr. STOKES replied that under ordinary principles of criminal law Fruehauf would have the defense of impossibility by reason of the action of the French court. This defense would not have been available in the absence of the French decision. In any event, public international law would not prevent the United States from proceeding against Fruehauf, if it so desired.

Mr. FRANZ OPPENHEIMER commented that the United States Treasury regulations on foreign assets and foreign transactions have been framed without regard to the policy of other countries. And U. S. export controls, enforced extraterritorially by means of these regulations, as well as those regulations themselves have been characteristic of a government of men and not of laws.

Professor BASIL YANAKAKIS stated that different nations place different emphasis upon the importance of the concept of sovereignty. He noted that this difference in emphasis stemmed from notions of convenience rather than of morality.

Mr. HOWARD E. HENSLEIGH noted that under public international law it is proper for a state to apply its law to its citizens wherever they are—on the high seas, in international airspace, in outer space, and even when they are within the territory of other countries. A problem exists, however, where complying with the law of a state conflicts with the jurisdictional rights of another state. He also pointed out that a court must frequently refer to local law in deciding a question of public international law.

Mr. STOKES agreed with this latter point as regards decisions of national courts on questions of international law. He stated that the International Court of Justice, as well as its predecessor, the Permanent Court of Inter-

national Justice, has frequently cited as useful precedents decisions of national courts on questions of international law.

Mr. PETER D. TROBOFF pointed out that the Office of Foreign Assets Control, which administers the Foreign and Cuban Assets Control Regulations as well as the Rhodesian Sanctions Regulations, has made available in the Treasury Department library a series of informal, unpublished opinions with respect to the scope of these Regulations. He urged that the Treasury Department publish more of these guidelines and make them more widely available so that practitioners will have a better understanding of the scope of these Regulations which have extensive extraterritorial application.

Professor P. JOHN KOZYRIS noted the recent trend for the enactment of State tender offer statutes with extraterritorial effect. For example, the recently enacted Ohio tender offer statute apparently applies to tender offers made outside Ohio for stock not only of Ohio-incorporated but also of Ohio-based companies. Thus, if a New York person makes a tender offer in New York for the stock of a Delaware corporation which is Ohio-based under the Ohio definition, *i.e.* which has its principal place of business and substantial assets in Ohio, the disclosure and waiting-period requirements of the Ohio statute must be met. Professor KOZYRIS invited comment on this point, especially on the constitutionality of such extraterritorial application, assuming that the statute should be classified either as "blue sky" or as "internal affairs" type of legislation.

Mr. MONROE LEIGH referred to the recent attempt of Bolivia to expropriate oil that had been originally extracted from a Bolivian well but that was in Chile at the time of the Bolivian decree. Mr. Leigh inquired whether the rule of the *Sabbatino* case was applicable.

Mr. STOKES replied that Mr. Leigh's situation was distinguishable from that involved in the *Sabbatino* case. The act of state doctrine, as applied in *Sabbatino*, is not applicable in a situation where the property is outside the state at the time of that state's attempt to expropriate it.

The CHAIRMAN then declared the session adjourned.

### The United Nations and Science

The session convened at 9:30 o'clock a.m. in the Basildon Room of the Waldorf-Astoria Hotel, with Professor HAROLD D. LASSWELL of Yale Law School presiding. After outlining the basic rules of procedure for the conduct of the meeting, Professor LASSWELL made the following remarks:

The discussion this morning will include reference to past, present, and future United Nations activities as they affect science. The first presentation is by a man who has made considerable success in transnational inquiries. His success lies in the fact that he has been able to follow through on his projects and achieve specific results. He presently works as Deputy Director of Research for UNITAR, Professor Alexander Szalai.

## THE UNITED NATIONS AND THE SOCIAL AND BEHAVIORAL SCIENCES

*By Alexander Szalai \**

What can the United Nations offer to the social sciences? What can the social sciences offer to the United Nations?

These are the two questions to which we are addressing ourselves. However, both questions are formulated somewhat ambiguously. Are actual offers to be considered, that is, offers existing at present, or should we consider also potential offers—things which the United Nations could do for the social sciences but do not do at present, things which the social sciences do not do for the United Nations but could possibly do even now.

We shall try to include in our considerations actual and potential aspects but both mainly within the framework of the present. The potentials of the more distant future development of the world organization and of the social sciences, two futures which we believe to be closely interconnected and even interdependent, will enter into our consideration only briefly at the very end. In some respects it is more difficult to speak about the present than about the future and at this point it is perhaps even more necessary.

Probably the greatest direct service the United Nations system provides to the social sciences consists in the preparation and publication of such important world-wide general-purpose scientific data collections and surveys as the *Statistical Yearbook of the United Nations*, the *Yearbook of International Trade Statistics*, the *Demographic Yearbook*, the *UNESCO Statistical Yearbook*, the *World Economic Survey*, the *Growth of World Industry*, and the like. Although the United Nations organs involved in this kind of work are often not in a position to check or critically evaluate the data which are supplied mostly by governments, and great difficulties have to be overcome in many cases to achieve even a modicum of cross-national standardization in the data supply, these encyclopedic international data collections and surveys have become indispensable tools of contemporary social science research.

The contribution of the United Nations system to the international organization of social science is much more moderate. The International Social Science Council and some of the international associations of social scientists receive sponsorship and a minimum of financial support from UNESCO; a number of conferences, panels and commissions organized or sponsored by UNESCO, ILO, WHO or the United Nations itself serve as welcome opportunities for the exchange of views between social scientists from various parts of the world, and some of their reports, resolutions or recommendations are channeled into the work of intergovernmental organizations. However, no action comparable to the International Geophysical Year, the International Biological Program or the World

\* Deputy Director of Research, United Nations Institute for Training and Research (UNITAR).

Weather Watch has been launched in the social science sector to co-ordinate and integrate inter-disciplinary research and inquiry on a more or less global scale. Even regional centers for facilitating the planning and implementation of social science research projects such as the European Centre for Coordination of Research and Documentation in Social Sciences in Vienna, which has been created with UNESCO's help, are few and far between, and greatly lacking in organizational and financial support.

Still worse, United Nations action is far behind in coping with practical obstacles and difficulties facing international co-operation in social science research. Some time ago UNESCO achieved a fair amount of success in promoting international agreements granting customs exceptions and other trade facilities to books, newspapers, works of art, educational films and recordings, but it has not yet taken any steps to facilitate the free flow of data media such as punched card decks or computer data tapes across frontiers. Or one may cite a problem such as the increasing number of countries in which the collection of social science field data, especially for purposes of cross-national comparative research, has become subject to preliminary government approval. This has not even been taken up for systematic discussion. Little if anything has been done to counteract the growing and not always unfounded mistrust of developing countries regarding international social research in general, *e.g.*, by finding some kind of mechanism for the accreditation of *bona fide* research which would provide guarantees against misuse.

In view of the magnitude and complexity of political and socio-economic problems with which the United Nations has to cope, the rôle assigned to social science research within the world organization itself and the research effort developed within the United Nations system by its organs and agencies seems to be indeed disproportionately small.

The Charter of the United Nations contains a single explicit reference to "research" and this in a somewhat odd context. Article 73 requests that member states which have or assume responsibilities for the administration of non-self-governing territories "encourage research" which would help the development of those territories. No reference is made anywhere in the Charter to research which the United Nations should carry out or encourage. There are, however, a couple of references to "studies" which various principal organs of the United Nations should initiate or even undertake for the purpose of promoting international co-operation in the political, economic, social, cultural, educational and health fields, or on human rights.

Now, studies in the broad sense of the word really occupy a considerable space in the total intellectual output of the United Nations system with respect to problems pertinent to the social sciences. But only a very small fraction of these studies could be termed research papers in the scholarly sense, *i.e.*, studies reporting genuine, original research findings resulting from the author's own investigations. Typically such studies produced by the United Nations are either digests of reports submitted by agencies,

governments, expert panels or individual experts and observers, or more or less evaluative summaries of existing documents and informative materials, sometimes expertly done reviews of available evidence, including available research evidence, on some important problem. However, they rarely contribute new research results, still more rarely do they add new theoretical concepts and generalizations to the existing stock of social science knowledge. This does not mean, of course, that many of these studies are not very valuable for the development of international planning and action and also for the general spreading of knowledge and enlightenment. But on the whole they do not reflect any major involvement of the United Nations system in social science research as such. By far the greater part of the studies originate from day-to-day political, operational and administrative needs and concerns of the deliberative bodies and apparatus of the United Nations system and it is by no means a generally accepted or even very widespread view within the system that purposive, original social science research initiated or carried out by organs and agencies of the United Nations could make a major contribution to the solving of those problems with which the system has to cope every day.

As a matter of fact, until fairly recently there have been few if any institutional, organizational and financial provisions with the United Nations system which would have permitted the development of a research activity of some portent. The small network of United Nations organs and offices which have research among their major tasks, for example, the United Nations Institute for Training and Research (UNITAR), the United Nations Research Institute for Social Development (UNRISD), or the Centre for Development Planning, Projections and Policies (CPPP) within the United Nations Secretariat itself, have mostly been created during the last decade and owe their existence mainly to the opening up of resources outside of the regular budget of the United Nations and the specialized agencies. But quite apart from such questions, the whole international civil service, as presently set up, including the personnel policies and staff regulations of the United Nations system, does not create a particularly favorable milieu for the development of research activities within the world organization. As in most governmental civil services, scholarly prominence and achievements play a rather subordinate and sometimes even a negative rôle when persons are to be considered for appointment or promotion; professionals on the staff are not particularly encouraged to strive for higher academic degrees and often they will find that such studies are not facilitated by the organization; the publication of scholarly books or papers by staff members is by no means generally well regarded and sometimes even frowned upon; and as far as controversial problems under consideration by the world organization are concerned, staff members need special permission before speaking or writing about them publicly even as private scholars. The kind of free time and freedom members of the academic community enjoy in their scholarly activities, the facilities and the assistance they have for doing research are to a great extent un-



known even in those corners of the United Nations system where research activities are deployed.

These restrictions and limitations are partly connected with or even inherent in the special character of the tasks the United Nations system and the international civil service have to perform. But partly, and perhaps mainly, they are a consequence of the fact that the essential need for research *by* the world organization and *within* the world organization, that is, the need for social science research and especially behavioral research for the improvement of problem-handling and problem-solving by the deliberative bodies and operational organs of the United Nations system, has not yet been fully recognized. In brief: research is not yet regarded as part of the *duties* the world organization and its international civil service have to perform to be able to fulfill their general mandate.

Although the United Nations Secretariat offers ample working space, excellent communications facilities and very comprehensive information and documentation services for representatives of the mass media who wish to report on the activities of the world organization, nothing comparable is being put at the disposal of scholars who would like to do research on the United Nations in the United Nations. It is a routine matter for a journalist from any obscure provincial paper to receive accreditation which permits him to enter the corridors and lounges reserved for delegates to the United Nations and to approach anybody with his questions. A political scientist of considerable reputation would probably find it rather more difficult to obtain the same freedom to move around, observe and ask questions. Albeit United Nations Headquarters alone produces about 90,000 documents per year, no indexing system suitable for the needs of social scientists and scholarly investigation has yet been introduced. Furthermore, the facilities and services that the Dag Hammarskjöld Library, the central library of the United Nations, can offer to scholars are modest and access to archive materials for research purposes is not made easy.

However, there has for some years been a growing recognition of the fact that only a very considerable widening of research on United Nations problems and activities, and especially on the world organization itself, can help make the United Nations system more effective and able to cope with the immense problems with which it is burdened. It has also become increasingly clear that to get the necessary amount and kind of research done, the United Nations has to develop and expand its own research facilities. This does not mean that the United Nations could or should ever have the capability to do all or most of the research needed for its own purposes. Its own research establishments also have to function as connecting links with the whole world of research—initiating and stimulating co-operative research projects, conveying problems of the United Nations to the world-wide community of scholars and making the United Nations more accessible to extra-mural research institutions. Only by switching the United Nations into the blood circulation, into the main arteries and the full capillary network of contemporary scholarly thought and inquiry, can the aims of the world organization be achieved.

On the other hand, it should not be overlooked that the world organization itself provides an incomparable set-up for world-wide political and socio-economic research. Where else is there an organization which maintains more than six hundred regional and branch offices—resident staffs, economic missions, information centers, science offices, social affairs offices and so forth—on five continents, in more than a hundred countries and territories, many of them equipped with a staff of professionally trained observers, economists, statisticians, experts of all sorts? Where else is there an organization which can directly address 126 governments through their permanent representatives asking them for authoritative information, in some cases also for the actual support of inquiries? Academic research is greatly hampered in attempting to carry out more comprehensive cross-national comparative investigations, especially operations involving field data collection, by the mere fact that academic institutions are national institutions and their proposals for co-operation, and even more their teams going into the field, are not always well received, at least in some countries. Research carried out under the flag of the United Nations could be and actually has already proved to be to some extent free from such limitations.

The United Nations Institute for Training and Research was, for instance, recently able to carry out a survey of mass media coverage of United Nations activities, a project involving, synchronously, the clipping of nearly 1,800 newspapers and the monitoring of nearly 200 radio and 100 television broadcast stations and networks in fifty countries of the world, including the coding and processing of the approximately 100,000 information items collected, and it was able to do this by obtaining the support of the United Nations' own world-wide network of Information Centers, and the voluntary co-operation of a great many domestic governmental, academic and private organizations in the countries involved. Apart from the prohibitive cost of such an undertaking, had all those services to be paid for, it is nearly inconceivable that such a project could be organized without the prestige and good will which the United Nations enjoys in so many quarters, governmental, academic and private alike, without the facilities of the communications and pouch services of the United Nations, not to speak of the expertise in languages concentrated in the world-wide network of United Nations regional and branch offices as an information output in some 80 languages had to be handled. Another UNITAR project, now in progress, involves the interviewing of students and former students from developing countries who have come to developed countries to receive their professional education or to specialize at universities in the advanced countries. The aim of this investigation is to find out more about the conditions and motivations which prompt such young intellectuals to seek a living and a career in their country of education after having completed their studies or to return to their home countries. The field work is being carried out according to standardized sampling and interviewing procedures in five advanced countries (United States, Canada, United Kingdom, France and the Federal Republic of Germany) and—with returned students and their hirers—in some ten developing countries.

Here again, in view of the very delicate subject and also of the widespread mistrust and malaise of student bodies, it would be very difficult to carry out such a cross-national comparative investigation without having the credit of the United Nations behind it.

UNITAR is also involved in a research project concerned with methods and techniques for the settlement of international disputes, the rôle of the mediator, the right timing of mediation and the like. Now, it is obviously of fundamental importance for such a project to be able to draw on the wisdom and experience of the professionals of multilateral diplomacy—high echelons of the United Nations Secretariat, Heads of Missions to the United Nations, and the like. These are not people who are easily accessible for consultation on matters of research, or who would normally be available for collective discussion of research problems. Nevertheless, it is a fact that most of those invited to participate in UNITAR research panels on peaceful settlement and conflict resolution not only accepted the invitation to participate but also found the time to engage in very detailed day-long discussions on the conceptual and planning problems of this project. They also felt remarkably free to give their very personal views. It is rather rewarding to see on such and similar occasions that the need for research on such incisive problems is more and more acknowledged by the top-level professionals of international diplomacy.

However, there is still a long road to go. The total volume of research done in the United Nations and for the United Nations is as yet rather small and the status of research is not yet well established within the United Nations system. The network of United Nations organs and offices destined to do research is really at the beginning of its development; it is under-staffed and under-financed, its relations with decision-making centers and operative organs of the world organization and its co-operative and communicative arrangements with the outside world of scholarship have still to be worked out in many respects.

The idea of an International University to be founded and maintained by the United Nations has received new impetus by an initiative of the Secretary General and a resolution of the General Assembly. This in itself is probably a sign that the need for more scholarship, more scholarly thinking and searching in matters of concern to the United Nations is coming into the focus of attention. Whatever institutional solution is found for the International University, there can hardly be any doubt that the social sciences will have a prominent rôle to play in all its teaching and research functions, as single disciplines and still more as key contributors to the solution of most interdisciplinary problems affecting the United Nations.

Let us have a look now at the other side of the medal. What can and indeed do the social sciences offer to the United Nations? This question can be investigated from various angles.

As way of introduction we might perhaps be well advised to state the fact that compared to the enormous amount of research on *international affairs* in general—on international politics, world economics, relations be-

tween various states or groups of states, and the like—the amount of research on *international organization* is rather small. Of the great number of academic and other research institutes for international affairs only relatively few are closely concerned with problems of international organization and more specifically with problems of the United Nations system as an organization. The same applies, by the way, to the set of scholarly journals devoted to international affairs. In textbooks on organization theory or on public administration we mostly find only rather perfunctory treatment, or none at all, of principles and problems of international organization and international public administration, probably because not much is known about them, at least not on a level of analytic penetration and conceptualization that would make it simple to reach easily understandable textbook generalizations.

Though there is a dearth of actual research experience on the *modus operandi* of international organizations and not many research techniques have as yet been developed or adapted for that purpose, there seems to exist in some quarters the curious notion that the social sciences have in their possession a ready-made set of concepts and methods which have only to be “applied” to organizational and operational problems of the United Nations to produce in a rather short time valid research results which could then be “used” directly to enhance the effectiveness of the world organization.

Now, were a harassed administrator to think that, if any money at all was to be spent on social science research in the United Nations, it should be on some brand of “instant research” that could produce, in the very short term, useful “solutions” to the problems with which he was burdened, maybe by simply pouring some scholarly holy water over the freeze-dried extract of futile discussions which have percolated over the years through a system of committees and secretariat offices, this would be at least an excusable example of desperate wishful thinking based on lack of information regarding how science really works. But what should one say if a prominent political scientist so eminently knowledgeable about United Nations affairs as Ernst Haas expresses, as he does in one of his recently published writings, his somewhat critical amazement that, although the United Nations Institute for Training and Research has been in existence for about four years and was given the mandate to undertake research “in fields such as the evaluation of development aid projects, methods of pacific settlement and peacekeeping, the protection of human rights, and the transfer of technological skills to non-Western cultures,” and given the fact that “operations analysis, evaluation and planning” have been included in the program of the institute, in the four years of its existence this Institute has been unable to give “systematic character” to its work in the coverage of all these fields of international activity, and its work has not resulted “in any strong link with the United Nations decision-making process.”<sup>1</sup> Reading this, it might really seem as if the

<sup>1</sup> Ernst B. Haas, *Tangle of Hopes. American Commitments and World Order* 208–209 (Prentice-Hall, 1969).

dozen or less professionals who form the research staff of this United Nations institute must have been frittering away their time for four years by merely trying to open up some new approaches to each of the above-mentioned fields and by producing some partial contributions but admittedly not covering "systematically" the full extent of the minuscule problems the United Nations faces with regard to such matters as the evaluation of development aid projects, methods of pacific settlement and peacekeeping, the protection of human rights and transfer of technological skills to less developed countries. Furthermore, as political scientists, sociologists, social psychologists, and scholars of international law for that matter, have found it so easy all over the world to establish strong links with the decision-making process of the governments of their own countries and have succeeded in a jiffy in producing policy-relevant research results and in influencing policy-makers by them, something must be curiously wrong that this has not been achieved in the United Nations by a research organization created as long ago as 1965.

Speaking seriously, it has to be pointed out, first, that, at the present stage of our theoretical knowledge and methodological capability, almost all research on human affairs as complex and multifaceted as those in which the United Nations is involved has to be of a more or less exploratory character, groping and taking soundings. There is as yet little that can be "systematic" about it. For the statesman, the diplomatist, the administrator the question may be: "What is the solution?" For the researcher it is mostly: "What is the problem?" Peacekeeping or the protection of human rights is, of course, a concern of overwhelming importance, so for that matter, and much more concretely is the Middle East crisis or *Apartheid* for the United Nations at present. But it takes a lot of groping, sounding out and experimenting to find threads and nodes in the tangle of human affairs involved which are truly researchable, not *per se* as things of scholarly interest (because we know so little that anything would be worth looking into), but as topics which are researchable within the United Nations context with tools we have at our disposal or may hope to develop in the foreseeable future, and with the hope that our research may in a reasonable period of time produce at least some results of more or less direct relevance to those who have to grapple in a practical way with these immense questions. And *if* such researchable ingredients and components of a situation posing a problem to the United Nations are found, and if all the needed tools of research are also found and applied to them and some new insight or understanding is produced which seems to be in some way relevant to the problem in the eyes of the researcher, there is still a lot more of groping, sounding out and experimenting for him to do to find out how to convey his findings to the statesman, the diplomatist and the administrator so that these individuals take notice of it, recognize its relevance to their own political or administrative practice and see it as something useful in the pursuance of their own practical interests.

How to inject methodically research and validated facts and objective

scientific truths into the political process, especially in the context of international politics and international organization, is in itself an oppressive problem and not an easily researchable one. Just look at what has happened in the case of public opinion research. There are few if any so well-developed, well-tested and ready-to-use research technologies in the whole realm of the behavioral sciences as those of surveying public opinion. If conscientiously applied by trained professionals observing strict methodical and ethical standards, they can produce results of high reliability and great predictive value, which are also of obvious relevance to practical politicians. They can forecast, for instance, results of nationwide elections and even the actual voting behavior of fairly closely defined sub-groups of the population with a small fractional error in percentages; they can often detect trends of change in mass attitudes much before even the most experienced and sensitive politician would perceive them. And now look what happens to the best-controlled and most reputable findings of this kind when they are thrown into the actual arena of political contestation, when they get into the hands of political actors. They are used, no doubt, but for what purpose and with what consequences to make the choice of the people more effective? There is no easy answer to that question. In general, there is no great difference in the primary treatment which is given in the political process to a scientifically validated truth and to a preposterous lie or fake; much will depend on their relation to the actual interest of the parties involved. Although the truth may have a better chance to prevail in the long run, that long run may well end when all parties and the whole issue are dead. Still, the situation is not as hopeless as it might seem in this perspective. As a matter of fact, it is just this indiscriminate character of the argumentation in the traditional political process and the impasse to which it has led in the treatment of so many questions that gives impetus to the movement to strengthen the position of research on political matters, more specifically on international affairs and problems of international organization—a development which may well lead, though perhaps not in the very near future, to a step-wise penetration of the political decision-making process by scientific methods of fact-finding, evaluation and planning in human affairs.

However, the blame should not be put onesidedly on the present state of political process and of political organization. Is there really so much that social science can offer at present to improve, in practice, the conduct of human affairs?

Following an ingenious initiative of Yehezkel Dror,<sup>2</sup> we ourselves went to the trouble of reviewing item by item all the research results listed systematically in Berelson and Steiner's well-known encyclopedic volume, *Human Behavior: An Inventory of Scientific Findings* (Harcourt, Brace & World, 1964, 712 pp.), which encompasses most of the more impor-

<sup>2</sup> Yehezkel Dror, *Analytical Approaches and Applied Social Sciences*. Paper prepared for presentation at Rutgers University and *Trans-action* Magazine Conference on Public Policy and Social Science, November, 1969, p. 4.

tant and verified generalizations that research on human behavior has produced in the last few decades. It includes, among others, voluminous chapters about organizations, institutions, social stratification, ethnic relations, and so forth. We tried to identify among the many hundreds of valid propositions those which an active politician involved in the solution of concrete problems, or for that matter a highly placed officer of the United Nations system, would find, if not immediately applicable in his decision-making activity, at least of some more or less direct relevance to his thinking and knowledge. Propositions, that is, to which after due consideration his answer would not be: "So what?" Well, after having gone with pencil in hand over the seven hundred pages of this inventory, we were able to mark some twenty such propositions and could do nothing else but confirm the experience of Dror, who tried to identify in the same book items he would include in a "Handbook of Behavioral Sciences for Policy-making" and who ended up by saying: "The results are insufficient for a short article, not to speak of a 'handbook'."

We think that the whole notion of "applied" social sciences and "applied" research—a notion which recurs constantly in discussion of the tasks of researchers working within the framework of political administrations and organizations—deserves some serious critical reconsideration. The terms "applied science" and "applied research" originated in the second half of the nineteenth century when in two distinct branches of the natural sciences—in chemistry and in the physics of electrical phenomena—such a great body of qualitative and quantitative scientific findings and generalizations, and such a detailed knowledge of the laws of nature had been accumulated that the first two scientific industries in the history of mankind, the synthetic organic chemical industry and the electrical industry, could be launched, both in entirely new product fields where no previous human industry based on and built up by traditionally accumulated human know-how existed. The depth and riches of *basic* findings and generalizations, the exact formulation of the laws of nature governing the composition of organic chemicals and electrical processes made it possible to seek for the *application* of the same to the fulfillment of human needs. It should be noted that in pre-existing branches of industry where a great amount, however imperfect, of traditionally accumulated know-how had established itself since time immemorial in the meeting of human needs, as in the production of foods, textiles, leather, furniture and housing, incomparably fewer inroads were made by scientific research probably because the producers felt quite satisfied with their own traditional know-how and the consumers did not know better.

Now, looked at from such an angle, in most branches of social science we are indeed very far from a stage of development where one could think of widespread "applicability" to practical problems of society and politics, especially to practical problems of international politics and world organization. The great body of qualitative and quantitative scientific findings and generalizations, the detailed knowledge of laws of human nature and society from which "applied" research should start, exists only

to a very very small degree. Also, we are moving in fields where traditionally accumulated know-how, however imperfect and even positively wrong, is strongly established and opposes considerable resistance to scientific penetration into its own realm of action and power.

We can draw some consolation from what John Maynard Keynes wrote some decades ago:

The ideas of economists and political philosophers both when they are right and when they are wrong are more powerful than is commonly understood. Indeed the world is ruled by little else. Practical men, who believe themselves to be quite exempt from any intellectual influences, are usually the slaves of some defunct economist. Madmen in authority, who hear voices in the air, are distilling their frenzy from some academic scribbler of a few years back . . . soon or late, it is ideas, not vested interests, which are dangerous for good and evil.

Well, in the nearly forty years since these lines were written economists at least have achieved some success in accumulating a certain body of scientifically validated insights and generalizations giving rise to a science of applied economics in the strict sense of the word, and this in turn has not failed to make an impact—not to be overestimated at present but still growing—on at least some types of economic policy-making, private, governmental and inter-governmental. Some of the abstruse ideologies of “practical men” and some of the voices in the air listened to so attentively by “madmen in authority” have been successfully driven back by the impact of valid economic research.

Economic phenomena and processes are based to a very great extent on the aggregate interaction and summative effects of billions of decisions taken every day by a vast number of people pursuing their own fairly well-perceived immediate interests in the home, on the markets and at their places of work. Also, money provides a fairly well standardized, and at any rate easily quantifiable, measuring rod for the establishment of economic values and benefits for the evaluation of conditions and consequences of economic action and for comparisons of economic welfare.

In most domains of political and social decision-making and especially in the domain of international politics and international organization, the situation is much less favorable for the immediate application of the very sharp tools of contemporary quantitative and structural-functional analysis, model-building, system-testing and the like. Whims and prejudices, imponderables in the behavior of the elected or appointed few who participate in policy-making, the nebulous character of declared goals and values, the secrecy of the undeclared ones, the lack of a measuring rod for political and social costs and benefits, and many other factors make it difficult, though by no means impossible, to emulate the example of the economists.

Let us not underestimate in this context the considerable advances that have been made lately within that narrower group of contemporary social sciences which we are wont to comprehend under the name of behavioral sciences in developing scientific approaches even to the kinds of problems pertinent to the rationalization of the political and social policy-making



process. And though we cannot quite share the optimism of Kenneth Boulding, who thinks that we seem to be already within sight "at least of a general theory of the international system which could be subject to study and modification in the direction of reality through a process of careful observation and testing," we do agree with him that the application of modern analytic tools and behavioral approaches to problems of international politics and international organization gives us hopes that in time a true "international-systems theory" can be established, differentiated "from the literary and speculative theories which have characterized political thought from the time of Aristotle which often have a great deal of value and provide, indeed, profound insights, but which do not constitute an organic, continuously developing model such as characterizes genuinely scientific images."<sup>3</sup> The establishment of such a consistent and validated theory could of course lead to a wide extension of directly "operational" applications of research in the conduct of international affairs and thus transform the international system itself.

Characteristically, one of those who was among the first in initiating the application of modern analytic tools and behavioral approaches to policy-making problems and devoted a lifetime's work to their refinement, Harold Lasswell, was also the man who first proposed the concept of "policy sciences," a special set of scientific methods and conceptualizations intended to *serve* in the best sense of the word policy-making itself.<sup>4</sup> Operations research, information theory, theory of games, systems analysis, or cybernetics for that matter, at their present stage of development and taken one by one, may as yet have only very partial immediate applicability to the immensely complex problems involved in practical policy-making at the national and international level. But still the judicious combination of all these approaches within the conceptual and methodological framework of contemporary behavioral research with insights won by the application of some more traditional methods of social science and of political and social fact-finding can produce results of high importance for the improvement of the political process.

At present, within the United Nations system, administrative organs are just beginning to make some very modest and rather experimental use of the tools of which we have just spoken, and mostly only on the house-keeping level. On the whole, the routinely applied concepts and techniques of contemporary management consultancy practice, some applications of computerized data analysis and information retrieval are beginning to get accepted. This is, by the way, a very beneficial development because at least at that level there really exists a fairly comprehensive and consistent body of systematized knowledge which, at the price of some *strictu sensu* applied research, can contribute in the very short term and very incisively to the better management of affairs within the United

<sup>3</sup> Kenneth Boulding, *The Impact of the Social Sciences* 70 (Rutgers University Press, 1966).

<sup>4</sup> Daniel Lerner and Harold D. Lasswell (eds.), *The Policy Sciences: Recent Developments in Scope and Methods* (Stanford University Press, 1951).

Nations system. The seriousness and the difficulty of problems encountered even on the housekeeping level, and the research effort needed to achieve within the context and the dimensions of the world organization valid applications of concepts and techniques that are routine elsewhere, should by no means be underestimated.

There is no doubt, however, that our real hopes for better management of international affairs are directed to a much higher level—the level of policy-making and decision-making in the United Nations. It is here that the social and behavioral sciences have to make their decisive contribution.

Nevertheless, it seems doubtful to us whether at the present stage the often heard advice to concentrate on “problem-oriented” or “policy-oriented” research is really so well chosen or so easy to follow. At least as far as the natural sciences are concerned, experience seems to indicate that decisive new developments which have greatly improved mankind’s practical mastery of nature and have made the greatest contribution to the fulfillment of his needs have to a very important extent *not* sprung from research “oriented” to his oppressing practical needs and problems. They have sprung rather from more or less free-floating basic research directed by thirst for knowledge, by puzzlement about some seemingly far-fetched and insignificant observations, and even by playful curiosity or artistic interest. Surely Hertz’s experiments on the generation and propagation of electromagnetic waves corresponding to some obscure aspects of Maxwell’s equations were by no means oriented to the problem of how to establish a technique for world-wide voice communication and information transmission without the use of wires. On the other hand, it is hard to conceive how any research oriented to the problem of world-wide voice communication and information transmission, or “applied” to it, could have produced Hertz’ crucial experiments. Nor is it merely a case of “serendipity” that basic research in physics made it possible to solve that monumental technical problem. The biggest profit-makers from scientific advances, the great industrial corporations of our time, have learned the hard way that only by stimulating, supporting and organizing a considerable amount of possibly non-profitable basic research within their own laboratories and elsewhere can they hope to give real impetus on a broad front to more directly problem-oriented or rather profit-oriented industrial applied research and development, producing such highly useful and profitable gadgets as transistors, lasers, and desk-computers memorizing thousands of bits of information on small specks of ultra-thin magnetic film. Should the relation of basic and applied research in the social sciences be so very different?

We are pleading here essentially against an over-emphasis of “problem-orientedness” and “policy-orientedness” in social science research. This attitude seems to be rather prevalent among those policy-makers and administrators who already recognize the relevance of social science research for their own business and the need for a much greater research effort, but who still think that most or all research which is *relevant* for the

solution of their problems of policy and organization must be "oriented" to, *i.e.*, directly concerned with, their problems and policies. In brief, it is a narrow interpretation of what is "policy-relevant" that we are doubtful about. We think, by the way, that the question of what types, levels and lines of research have a smaller or greater chance of producing results concretely influencing policy-making and decision-making in international affairs and on what variables the actual impact of those research findings would depend, is in itself a topic of great interest. However, this again is not an easily researchable topic, as it may well be connected with some very basic characteristics of human and institutional behavior about which we know yet very little.

We believe the development of certain types of *behavioral research on international affairs* carries the greatest promise of results that could have very great relevance for improvement of the political process within the United Nations and for enhancement of the effectiveness of the world organization.

In a very deep and thought-provoking study on the theory of international obligations, Oscar Schachter recently outlined a type of behavioral inquiry which would be necessary to put international obligations and norms on a solid and empirically testable basis: "how to recognize an obligatory rule or principle when we see one, and, by the same token, how to reject a proposed candidate on the basis of identifiable data."<sup>5</sup>

Following up and developing further some earlier suggestions by McDougal and Lasswell, he proposed five processes as jointly required for the establishment of obligatory norms:

- (i) the formulation and designation of a requirement as to behavior in contingent circumstances;
- (ii) an indication that the designation has been made by persons recognized as having the competence (authority or legitimate rôle) to perform that function and in accordance with procedures accepted as proper for that purpose;
- (iii) an indication of the capacity and willingness of those concerned to make the designated requirement effective in fact;
- (iv) the transmittal of the requirement to those to whom it is addressed (the target audience);
- (v) the creation in the target audience of responses—both psychological and operational—which indicate that the designated requirement is regarded as authoritative (in the sense specified in (iii) above) and as likely to be complied with in the future in some substantial degree.<sup>6</sup>

Now, the interesting thing about these five processes devised by an international lawyer to test obligatory norms is that each and every one of them has to be based on a behavioral research procedure. How else can it be ascertained validly whether a requirement as to behavior in contingent circumstances has been duly formulated and designated; whether

<sup>5</sup> Oscar Schachter, "Towards a Theory of International Obligation," 8 *Virginia Journal of International Law* 308 (1968).

<sup>6</sup> *Ibid.*

people have the capacity and the willingness to carry out an obligation as to the way in which they should behave; whether target audiences have been reached by a message; whether responses elicited from them make it likely that they will comply in future in some substantial degree with the requirement put forward in that message, and so forth?

It goes without saying that an awesome apparatus of behavioral research would have to be mobilized by the world organization in order to be able to carry out the validation of international obligatory norms in the manner prescribed. We hasten to add that quite a lot of rather basic research would have to be carried out on expectational attitudes and norm-observing behavior of individuals and communities, also on a cross-national comparative basis, before even an attempt could be made at such a momentous task.

But, if we consider the enormous and costly international political, diplomatic and administrative apparatus maintained to establish and validate international obligatory norms *without* the help of behavioral research and, let us add, with a rather low degree of effectiveness and reliability, then the intellectual and material investment and effort needed to secure an adequate place and an adequate rôle to behavioral research in the conduct of international affairs appears to be much less overwhelming.

Schachter himself says that "if one thinks in terms of aggregate data and workable techniques for measurement of attitudes about subtle and nuanced questions of international law, the practicality of the test seems remote." But he rightly points out at the same time that

the issues do arise; claims are made, positions taken, responses given, collective views expressed in both organized and unorganized arenas. Diplomatic correspondence, international agreements, judicial decisions, scholarly studies, public statements of leaders, national legislation are all pertinent in some context. They may at some later period be supplemented by newer methods such as content analysis of state papers, memoirs, newspapers and the like. In interviews, participant observation, perhaps simulation techniques may some day be developed on a scale and with such refinement as to enable them to be used.<sup>7</sup>

We share Schachter's view that the hopes for more scientific and comprehensive techniques for ascertaining the perceptions and attitudes of the national or, for that matter, of the international decision-makers and other key groups, are perhaps not as far-fetched as they seem today, and that a vast and continuous network of data-collection and evaluation might some day provide the means of determining and verifying the expectations relating to the authority and effectiveness of international norms.

We referred here to Oscar Schachter's ideas only as exemplifications of the kind of presently conceivable services the social and behavioral sciences could potentially offer to the United Nations. It is an example for services on a very high level and of a very comprehensive character. It will take time until potentials for the penetration of international political procedures and of the world organization by scientific research can be realized at such a high level and with such comprehensive relevance.

<sup>7</sup> Schachter, *loc. cit.* 316.

However, we do think that this penetration of science into politics, of international social research into the international political process, indeed into all procedures of the world organization, *must* take place, on high and low level alike, comprehensively and in minute detail. There is no alternative to it, at least none the United Nations, and we ourselves individually, could easily survive.

The CHAIRMAN thanked Mr. Szalai and, in introducing the next speaker remarked upon the fact that Professor Dennis Livingston's presentation would emphasize future potentialities of science.

Professor DENNIS LIVINGSTON. Recently my interest has been more in the science fiction field than in international organizations. My paper will develop the concept of technological assessment and its application to the international level. There should be an interesting interaction between my presentation and that of Professor Mary Caldwell in terms of the assessment of technology and its application to the environmental problems.

## INTERNATIONAL TECHNOLOGY ASSESSMENT AND THE UNITED NATIONS SYSTEM

*By Dennis Livingston \**

The purpose of this paper is to elaborate a framework for the establishment and functioning of a technology assessment entity affiliated with the United Nations system and associated international organizations. That is, I do not intend to provide a detailed analysis of how such an entity would be organized or how it would carry out the actual assessment process, but will discuss the factors relevant to operationalizing these matters. This more general approach is necessitated at this time because of the newness of the technology assessment concept itself, let alone the possibility of viewing the procedures involved from an international perspective. I will proceed by explaining the assessment concept, justifying its application to the international level, and formulating a model of a United Nations connected assessment mechanism.

### THE TECHNOLOGY ASSESSMENT CONCEPT

It is not surprising that in the late 1960's growing public attention and an increasing body of literature focused upon technology assessment.<sup>1</sup>

\* Case Western Reserve University.

<sup>1</sup> National Academy of Engineering [NAE], *A Study of Technology Assessment* (1969); Library of Congress, *Technical Information for Congress* (1969); National Academy of Sciences [NAS], *Technology: Processes of Assessment and Choice* (1969); House Committee on Science and Astronautics, *Technology Assessment Seminar and Technology Assessment* (1969 and 1970); Kasper (ed.), *Technology Assessment—The Proceedings of a Seminar Series* (1969); Bauer, *Second-Order Consequences: A Methodological Essay on the Impact of Technology* (1969); Mayo *et al.*, *The Tech-*

Greater understanding of the environmental disruptions caused by the unintended consequences of technological diffusion, a distrust among followers of the youth culture of science and technology *per se*, appreciation among technologists and political leaders of the possibilities of applying technology to the solution or partial alleviation of social problems, and the emergence of a discipline for the anticipation of alternative technical and social futures—these forces, though not entirely compatible among themselves, all converged on the notion of the public assessment of technology for the greater benefit of the nation.

Technology assessment has been defined most succinctly by the U. S. National Academy of Engineering to comprise “the sociotechnical research that discloses the benefits and risks to society emanating from alternative courses in the development of scientific and technological opportunities.”<sup>2</sup> The assessment process thus connotes the injection into policy-making deliberations of informed judgments, based on comprehensive studies, of the potential consequences of present or future technologies for society and conscious decisions that certain lines of development are to be favored over others or that particular beneficial consequences of a given technology are to be maximized and more deleterious ones suppressed. Assessment may focus on technology and its implications for society and the environment, or on social problems—race relations, urban affairs, individual privacy, and the like—and how they are influenced by the array of available technologies. Assessment involves the purposive evaluation of what we wish to do with the tools of technology in order to fulfill societal goals; its output consists of alternative recommendations presented to political decision-makers to aid them in allocating technological resources among competing national priorities. Pervading these considerations is an explicit world-view that only continual oversight of technological diffusion can attempt in advance to cope with the far-reaching second-order consequences that may be loosed by technology on a fragile, interdependent world.

Defined in this manner, there is clearly nothing new about technology assessment.<sup>3</sup> Technology is being evaluated whenever a business decides to open a new product line, government passes relevant laws or administrative regulations, private groups lobby in favor of or opposition to such rules, or individuals decide on what goods and services, out of the total available, to purchase. What is relatively new in the current assessment debate is the consensus that a mechanism is needed at the national level to engage in the requisite research and recommendatory activities. To leave the carrying out of assessment to the private sector in whole or part

---

nology Assessment Function (3 parts) (1968); Wheeler, “Bringing Science Under Law,” 2 *The Center Magazine* 56 (1969); Wormuth, “Government and Science,” 3 *ibid.* 41 (1970); Lear, “Predicting the Consequences of Technology,” 53 *Saturday Review* 44 (1970).

<sup>2</sup> NAE, *op. cit.* 1.

<sup>3</sup> Kranzberg, “Historical Aspects of Technology Assessment,” in House Committee on Science and Astronautics, *Technology Assessment*, *op. cit.* 380–388.

is to subject judgments on the worthwhileness of utilizing technology to the whims of cost-benefit analysis based on the narrow market-place criterion of profitability. It is not that the desire to make money is inherently evil, but that this is not the only possible criterion on which to base judgments about the introduction of new technologies. The lesson of the whole pollution movement is that there are social costs in the production process that businesses, unless required by law, need not and usually do not take into account; and not only the environment, but broad social issues, as employment patterns or urban-rural relations, may be influenced for better or worse by the converging effects of technology, matters also beyond the ken of decisions based largely on the profit motive.<sup>4</sup> And even in the case of companies that believe in the current corporate rhetoric about "involvement," there is no guarantee that the views of private pressure groups or consumers' committees will be represented in the assessment process. The level for macro-decisions, applying social as well as technical criteria, about important technology is properly that of the national government, not as a replacement, but as a crucial supplement to decisions emanating from the private sector.

There is also consensus regarding the general organizational lines of a national assessment mechanism. The model, from which I will borrow in discussing, below, its international analogue, runs as follows: Within the context of the U. S. Government, an assessment agency could be located in either the executive or legislative branches, or in both. Whatever the case, the agency should be a separate entity, not identifiable with any particular Cabinet department or independent regulatory body. No less than in the business world, government organizations have their own vested interests, with a client relationship often developing between rule-making organs and the industries they supposedly regulate. Thus, the assessment agency should itself not have administrative or operational powers, so that it not become too allied with the private interests with which it will be concerned; but if it is to have any meaningful existence, the agency must be plugged into those parts of the government that establish technologically-related policy (e.g., the Executive Office of the President and Congressional committees). As to its size, an assessment agency obviously cannot contain within its members the range of skills needed for the variety of studies it will sponsor, nor can it maintain a permanent system of panels because of the swiftly-changing nature of the technology it may be desirable to study at any given time. Therefore, the agency can consist of a small staff operating as a management concern, in supervising contracts awarded to private and educational institutions for particular assessment jobs; the staff will also need to carry out in-house research activities related to the identification of problems requiring study, assignment of priority to these problems, and review of assessment functions of other governmental groups. The professional background of the staff should consist of individuals with recognized ex-

<sup>4</sup> Katz, "Statement," and Daddario, "The Four Faces of Technology Assessment," *ibid.* 173-183 and 376-380.

expertise in the sciences and engineering, including representation from the social sciences.<sup>5</sup>

Action has now been taken in the United States to place an agency with these characteristics within the Congress, pursuant to a bill introduced by Representative Emilio Daddario of Connecticut. The bill would establish an Office of Technology Assessment (OTA) whose director, appointed by the President, would report to the Controller General. OTA would develop *ad hoc* assessment panels under contract to engage in research on the consequences of particular technological issues. Policy for OTA would be set by a Board of Technology Assessment, whose members would consist of governmental and public individuals. Reports flowing from OTA would be sent to Congressional committees for their consideration in deciding how to allocate the research budget most efficaciously among the variety of scientific and technological activities sponsored by the Federal Government, and how to enact legislation best designed for realizing national priorities.<sup>6</sup>

#### THE CASE FOR INTERNATIONAL TECHNOLOGY ASSESSMENT

It might be thought that what has so far been described comprises the most that can be done at this stage of the game—the concept of technology assessment has been firmly established, prestigious research arms of the U. S. Government have indicated that it is feasible, and steps have been taken to set up an actual assessment mechanism. To contemplate moving this process to the international level may be viewed as both premature and superfluous. On the one hand, there is not yet enough practical experience even at the national level to know how well an assessment agency might work over a period of time or fulfill the hopes of its sponsors. On the other hand, with the introduction of the Daddario Bill, other industrialized countries will probably review their own prospects of establishing bodies similar to OTA; indeed, the Minister of Technology in Great Britain, Wedgewood Benn, visited the United States in April, 1970, to discuss, among other matters, American plans for technology assessment. Thus, if additional assessment agencies evolve within states, why should a further bureaucracy be imposed on the process?

I believe a case can be made for considering the establishment of a formal assessment body affiliated with the United Nations. It is based on the fact that there are consequences deriving from technology, and problems relevant to it, whose unified consideration would be beyond the scope of purely national technology assessment agencies.

First, a great deal of implicit assessment takes place within international organizations, and via bilateral co-operative programs, just as it does nationally. When the United States decides it is worthwhile to join with other states to research jointly such matters as outer space, pollution abatement, civilian nuclear reactors, and resources management; when UNESCO spins off international brain research and nuclear energy research organi-

<sup>5</sup> NAS, *op. cit.* vii–viii, 72–114; NAE, *op. cit.* 30–36.

<sup>6</sup> Lear, *loc. cit.* 44; New York Times, March 25, 1970, p. 23.



zations; when the International Council of Scientific Unions (ICSU) sponsors the International Biological Program for a co-ordinated look at the planetary biosphere; when the International Atomic Energy Agency (IAEA) establishes a safeguard system for nuclear reactors and materials; when the U.N. General Assembly sets up standing committees on outer space and the seabed; when the Intergovernmental Maritime Consultative Organization (IMCO) calls conferences to deal with oil pollution of the high seas—then assessment has taken place, an evaluation has been made that certain realms of technology are to be studied, projected, or dealt with. But like their national counterparts, there is no guarantee that international groups dealing with science and technology as part of their missions will deliberate systematically about the effects of the research or projects they fund on the global environment or on such world social problems as the technology gap and the population explosion. Also shared both nationally and internationally is the bureaucratic difficulty inherent in organizations that are charged with developing or regulating particular technologies also taking on the task of assessing these technologies from broader perspectives than those involved in a given organization's mission. As within the United States, so internationally, a rationalization of the process whereby a great number of diverse establishments to support technology is needed, priorities must be set, scarce international resources must be efficiently allocated, and anticipations of future developments should be undertaken.

Second, many of the secondary and tertiary consequences of technology are international, and so beyond the capacity of any one state to deal with effectively. This has become most apparent in the pollution field, where issues arise regarding the degradation of the natural environment by forms of pollution—air-water, radioactivity, noise—that transcend national boundaries.<sup>7</sup> Here, an agency is needed, not so much to evaluate the technological programs of international organizations and programs, but to assess developments within one or more states that may impact upon the international arena. Naturally, whatever studies states themselves generate can be most useful, but a supplementary organization, free to some degree from nationalistic biases, is also desirable.

Third, there is the relationship of science and technology to the less-developed countries. It is possible that some of them will want technical assistance in the establishment of assessment bodies within their governmental structures, perhaps for the evaluation of local environmental and social consequences of technology imported by foreign firms; or they may wish the postulated international assessment agency to undertake such study. There is also the fact that many of the technological developments originating within the industrialized nations have deep implications for the less-developed areas, both generally, as in the migration of talented

<sup>7</sup> Livingston, "Pollution Control: An International Perspective," 10 *Environment* 172 (1968); Wolman, "Pollution as an International Issue," 47 *Foreign Affairs* 164 (1968); U.N. Secretary General, *Problems of the Human Environment* (1969); Kennan, "To Prevent a World Wasteland: A Proposal," 48 *Foreign Affairs* 401 (1970).

individuals from their homelands to countries where greater professional opportunities are available, and specifically, as in the manufacture of synthetic goods that may rival natural products upon which countries depend for foreign exchange.<sup>8</sup> Again, those national assessment agencies that are organized may make valuable contributions to these issues from their own perspectives, but it is not likely that here, no more than in the foreign aid field, are less-developed countries liable to rest content with judgments of their problems undertaken solely by donor nations.

#### THE ORGANIZATION OF AN INTERNATIONAL TECHNOLOGY ASSESSMENT MECHANISM

If it be granted that there is a place for technology assessment at the international level, the remaining issue is the organization and functioning of an entity that would carry out this task. For heuristic purposes, let me suggest the establishment of an agency called the International Technology Assessment Board (INTAB).

Of the cluster of functions INTAB could perform, its primary task would be to act as the major international clearinghouse for monitoring developments in technological progress and their consequences. It would fulfill the tasks previously described as being lost in the welter of individual, and sometimes conflicting, assessments presently being made by a great variety of international organizations pursuant to their individual missions. More particularly, INTAB might engage in the following activities:

(1) *Contracting out specific technology assessment studies.* The assessment process of INTAB would originate with a request for the undertaking of an assessment task; the request could come from an international organization, one or more states, professional societies, and the Board's own initiative. The actual work of performing the assessment would then be contracted out to the appropriate research body; a wide number of options would be open here to INTAB, ranging from international organizations, to national assessment boards, universities, and the like. Internationally, one could conceive the work being done by such U.N. specialized agencies as the International Civil Aviation Organization on supersonic transports, the International Telecommunications Union on communications satellite frequency allocation, the IMCO on liability rules for oil tankers, and the IAEA on peaceful uses of nuclear energy as having been initiated or stimulated by the INTAB contract procedure. The actual methodology used to do the assessment will vary somewhat from case to case, but the U. S. National Academy of Engineering has provided a guide to the kinds of steps that might be taken, involving a refinement of the subject, development of the data base, identification of strategies for the solutions of problems by the technology being assessed, identification and measurement of the impacts of the technology and problems on affected parties, and comparison of the possible strategies.<sup>9</sup>

<sup>8</sup> Mayo, *op. cit.* Part I, pp. 3-4; House Committee on Government Operations, *Scientific Brain Drain from the Developing Countries* (1968); Caryl P. Haskins, *The Scientific Revolution and World Politics* 17-46 (1964).

<sup>9</sup> NAE, *op. cit.* 25-34.

The technologies with which INTAB would be concerned are those having consequences for the international environment or international relations. Any topic initiated by the Board itself or submitted to it by several states or international groups would normally fall within these categories. However, an additional interesting possibility arises. The U. S. Congress in 1969 passed a National Environmental Policy Act requiring agencies of the Federal Government that sponsored the construction of large-scale projects, such as airports and dams, to submit with the usual feasibility reports an account of the potential influence of a project on the environment. Why should there not be a similar requirement devolving upon countries that accept international aid for economic development projects? An organization like the World Bank already obligates applicant countries to fulfill stringent economic criteria pursuant to the granting of a loan; perhaps, in due course, states requesting aid in planning, for instance, nuclear-powered agricultural and industrial complexes, could be asked to show some awareness of the ecological implications of their undertakings. In such cases, both the states and international lending agencies involved might request INTAB to arrange for appropriate studies, or review of national assessments already performed.

(2) *Liaison and cooperation with national technology assessment bodies.* In its report, the U. S. National Academy of Sciences recommended that a national assessment mechanism award grants and conduct its own in-house research on problems relating to the assessment process itself, such as methods of selecting personnel and criteria for evaluating alternative policies presented; the maintenance of reference services, holding of symposia, and promoting of public education in assessment were other possible tasks put forward.<sup>10</sup> INTAB could equally be involved in these activities on its own and in co-operation with national boards. The establishment of information exchange in the process and content of technology assessment or the holding of research conferences on this subject by INTAB could be especially valuable to the less developed countries.

One particular area of research well suited to INTAB and worthy of its early attention would be the co-ordination of environmental monitoring programs of various sorts presently spread around several international organizations. Thus, the World Meteorological Organization (WMO) maintains a global network of land, sea, and air environmental sampling stations that will grow even more impressive as the World Weather Watch develops; the world Health Organization (WHO) monitors drugs; the International Commission for the Protection of the Rhine against Pollution takes samples of water quality of that important river; the International Biological Program plans to establish a series of stations using animal and mechanical sensors to sample the environments of different ecological settings. When this is combined with the possibility of launching earth resources observation satellites,<sup>11</sup> it is obvious that a major

<sup>10</sup> NAS, *op. cit.* 90-94.

<sup>11</sup> House Committee on Science and Astronautics, *Earth Resources Satellite System* (1969); R. E. Hallgren, "The World Weather Program," 8 TRW Space Log 2 (1968).

step toward keeping watch on second-order consequences of technology for the environment could be accomplished by a suitable program for coordination of all the samplers.

(3) *Issuance of an annual report on the use of science and technology for mankind.* It would be instructive to have some record of how science and technology have been utilized annually, and a projection for a short-term period ahead on what important developments might be expected in these fields. INTAB could assemble such a report, drawing upon the resources of such U.N. bodies as the U.N. Institute for Training and Research (UNITAR) and the Advisory Committee for the Application of Science and Technology to Development, the specialized agencies, and international scientific organizations. The report would be especially valuable if it attempted to use available social indicators to measure technology's impact on the quality of the environment<sup>12</sup> and the methodology of technological forecasting to extrapolate potential technological developments.<sup>13</sup> The Board-initiated contracts in assessment could stem, indeed, from problems brought to its attention in the process of preparing the report.

(4) *Provision of fact-finding and mediation services.* This is a function not contemplated in the reports for a U. S. assessment agency, but potentially useful on the international level. Some of the important disputes among states involve disagreements about the anticipated effects of large-scale technological projects, particularly the multi-utilization of international river systems and the carrying out of space experiments. INTAB, at the request of the concerned parties, could undertake impartial fact-finding and even mediation services. These would not be unprecedented. ICSU's Committee on Space Research established a Consultative Group on Potentially Harmful Effects of Space Experiments to review data connected with Project Westford, the U. S. attempt in 1963 to launch an experimental interference-free communications system consisting of copper dipoles; at the request of worried astronomers, the Group examined potential consequences of the program for observational and radio astronomy.<sup>14</sup> At the adjudicatory level, several cases of air and water pollution exist in which states claimed damages resulting to their territories by the harmful activities of neighboring states, with the issue resolved by tribunals or courts. It is not likely that INTAB would take on direct adjudication powers, at least at the start, but it could perform useful third-party functions in the peaceful settlement of technologically-derived disputes.

The tangible output of the assessment process is some report containing recommendations on the ways technology might be used to solve particular problems, and the steps that could be taken to ensure that deleterious

<sup>12</sup> Bauer (ed.), *Social Indicators* (1966); Gross (ed.), *Social Intelligence for America's Future: Explorations in Societal Problems* (1969).

<sup>13</sup> Ayres, *Technological Forecasting and Long-Range Planning* (1969); Jantsch, *Technological Forecasting in Perspective* (1967).

<sup>14</sup> Senate Committee on Aeronautical and Space Sciences, *International Cooperation and Organization for Outer Space* 390-399 (1965).

consequences do not result from its application. INTAB could channel its reports to the full range of its constituents—in particular the U.N. specialized agencies, and legal organs of the General Assembly—for their engagement in the decisions as to which technological strategies to choose. The output of this political process that uses the findings of technology assessment can be any combination of the range of controls available for the international direction of science and technology: awarding of research grants, drawing up codes of behavior, passing declaratory resolutions, establishing administrative regulations, and negotiating treaties. As an additional organizational mechanism, one could conceive of a new General Assembly standing committee, the Committee on Technology Assessment (UNCTA), empowered to engage in broad debates on this subject related to the annual reports of INTAB and any specific items relevant to assessment it wishes to discuss. Such a committee can serve as an educational medium for sensitizing governments to the concept of the assessment process, and could inject into the debates broad political and moral considerations that might have escaped INTAB.

As to the institutional location of INTAB itself, this is an open question. It could be a part of the U.N. or UNESCO Secretariats, a new commission of the Economic and Social Council, a pilot project office in UNITAR, or an independent agency. My own inclination is to hesitate to impose any more institutional burdens on the U.N. system, which has been amply criticized for already being too unwieldy, unresponsive, and inept. A possible model for INTAB in this regard is the Geneva Disarmament Conference, staffed and housed by the United Nations and sending its reports to the U.N. political committees, but otherwise autonomous of the organization. INTAB, in its beginning stages, might best function similarly as an autonomous agency of the United Nations but funded by it and with close connections with the General Assembly and specialized agencies.

Organized and functioning in this manner, INTAB, or something like it, would be a positive contribution to world order, would stimulate the progressive codification of international law in line with the most urgent needs of our time, and would serve as a catalyst for developing international consensus around the normative presumption that in an interdependent world, technology must be cultivated with a firm regard for enhancing those prospects it makes possible for the betterment of man.

The CHAIRMAN thanked Professor Livingston and introduced the next speaker, Professor Mary Ellen Caldwell.

Professor MARY ELLEN CALDWELL. I am delighted to serve on this panel concerned with the United Nations and Science. An article in a recent issue of *Science Magazine* confirms my optimism about the productive outputs of such sessions. That report noted that a number of interested individuals from several European countries have recently established a new institution designed to fill what Servan-Schrieber calls the "management gap." James Killian's idea—uttered at a conference not unlike this

one—for the establishment of a European M.I.T. was transformed to the promotion of a European School of Business Administration. That school is scheduled to open in the fall of 1970, and it promises to provide the European Community with a sophisticated corps of management personnel capable of full-fledged competition with Americans who have, to date, monopolized commercial and industrial development abroad. There is some hope, therefore, that the kinds of proposals likely to be developed at this session will materialize in one form or another.

I also find C. Wilfred Jenks' remarks on the *tempo* of the times especially encouraging. In his address at the 1967 Geneva World Conference on World Peace Through Law, Jenks made some far-out suggestions concerning global science and technology. Anticipating objections, he said:

If such possibilities appear to belong to the realm of fantasy, let us recall how improbable an Antarctic Treaty appeared to be as recently as ten years ago, a Nuclear Test Ban Treaty as recently as five years ago, and a Space Treaty as recently as two years ago. *We must measure the pause between the unthinkable and the accomplished by the rhythm of our own time.* (Emphasis added.)

Because I do not wish to spend too much time in an extemporaneous discussion of the intrinsic value of this panel, I shall proceed with the presentation of the concrete proposals prepared for this discussion.

## THE U.N. AND SCIENCE: PAST AND FUTURE IMPLICATIONS FOR WORLD HEALTH

*By Mary Ellen Caldwell \**

Within a month after the delegates from fifty countries signed the United Nations Charter in San Francisco, the United States tested the atom bomb. Shortly thereafter, the world had its first taste of nuclear war. At the same time, the facts about human experimentation in Nazi concentration camps began to unfold. World attention was thus drawn to frightening new dimensions in physics and the life sciences. From its earliest days, the United Nations has existed in a world milieu fearful of the misuse of "big science" and technology.

Although the United Nations and its specialized agencies are often thought of as political organizations, as extensions of national government on an international scale, it is essential to recall that protection and preservation of human life and welfare was, and continues to be, their ultimate goal. During the past twenty-five years, most of these organizations have been concerned with using the benefits of science and technology in the global public interest, and protecting the world community against detrimental effects from that same science and technology. A survey of the ways in which the United Nations system has undertaken to amplify

\* Professor of Law; Chairman, Mershon Caribbean Seminar on International Legal Problems of Community Health, The Ohio State University.

the positive benefits and to monitor negative side effects of science in the promotion of world health necessarily raises questions about the future. What are the prospects of improving the uses of science and technology in assisting the peoples of all nations to achieve optimum health and welfare?

A brief review of past trends will highlight some of the undeniably successful achievements of science and will indicate the precarious nature of these hard-won values which may be lost in the near future unless new ways are discovered to combat the threats to health posed primarily by the rapid growth of population and by accelerating dislocations in the global ecosystem.

#### POSITIVE USES OF SCIENCE FOR WORLD HEALTH

Clearly the most beneficial applications of modern science and technology have been realized in emergency programs to control disease and to increase the world's food supplies. As the periodic reports on the world health situation show, mass campaigns to eradicate disease and the introduction of improved agricultural techniques have reduced mortality and morbidity, and raised the level of nutrition for millions of people throughout the world.

By facilitating the spread of *applied science* from its points of origin in highly industrialized countries to the developing areas, the U.N. system has mediated what Professor Harold Lasswell calls the "universalization of the parochial." The diffusion of substances (such as DDT, vaccines, and fertilizers), of technologies (such as sanitation and hydroelectric systems), and of institutional techniques (such as mass immunization and education) has brought about an improved quality of life for mankind as a whole. This diffusion process has also stimulated the rapid development of other sciences. An example is the creation of complex communication systems for transferring information, skills, and technologies required in effectuating death control and providing more food.

In the evolution of U.N. programs, from the provision of emergency health relief to the promotion of over-all economic development, emphasis shifted toward the diffusion of *basic scientific knowledge*. The sharing of the technological fruits of applied science continues, but in the past decade the U.N. agencies have recognized the need for fostering the development of skilled manpower and scientific institutions in the developing nations themselves.

A major thrust in this direction was provided in 1963 when the United Nations sponsored a Conference on the Application of Science and Technology for the Benefit of the Less Developed Areas. The Conference concluded that "the skillful application of science and technology to the whole range of development problems was a pervasive task for all the institutions in the development business." Since that time, the major U.N. agencies have been increasingly concerned with the promotion of a basic science capacity in industrializing societies. The furtherance of such programs by the U.N. system has been aided by some secular developments in the science community.

Scientific knowledge has generally been regarded as a human artifact, a property held in common by the species as a whole. While its growth rate is often managed by both conscious and unconscious forces at work in society, it is not susceptible of complete monopolization or extinction so long as the species lives. Speculations about the "nuclear club" attest to the ubiquity and irreversibility of basic scientific knowledge. Nothing has occurred to modify this fundamental assumption. There has been a drastic change, however, in the attitudes of scientists about their responsibility for the future of mankind.

As the United Nations was being shaped in a period of global recoil from World War II and the bomb, the science community underwent an internal transformation. The repercussions of Hiroshima and Nagasaki shattered the physicists' detached and rigid objectivity. Competent scientists, shocked by the terrible, destructive results of their laboratory creations, confronted for the first time the morality of their rôles. Their response was an ethical one, a resolve to assume responsibility for their future actions. As scientists they vowed respect for life as an ethical norm. Today scientists who do not share this professional creed are considered intellectual and moral renegades.

This development took place in a scientific community that is essentially transnational. One needs only to recall the national origins of scientists, and the data currently being collected on the brain drain, to remember that scientists share more genuinely international experience and allegiance than any other group in modern society, except, perhaps, for the United Nations' international civil servants. They learn from and contribute to a common body of knowledge and a common methodology; despite differences in their political beliefs, they share many common attitudes. The scientific philosophy or mystique has left its mark upon their personalities.

Given these convergences—the essential orientation towards well-being of international organization, the internationality of scientific knowledge, the continuing spread of technology, and the transnational identifications of the scientific community—it is not surprising that the United Nations' applications of science in the service of man have produced spectacular results.

Scientists' active concern for the future has produced another effect, however, that may profoundly change the U.N. system's rôle in promoting health. During the 1960's the science community was successful in galvanizing world attention to the problems of the human environment. Documenting a persuasive case for imminent danger to the global ecosystem, they made it clear that science and technology are not singular goods, but are the responsible agents for new threats to human health and welfare.

#### THE NEGATIVE IMPLICATIONS OF SCIENCE FOR WORLD HEALTH

The United Nations' humanitarian programs to eradicate disease succeeded in producing the population explosion in the developing areas.



Death control, without parallel birth control, increased demands upon world food resources. Thus, saving people from death and disease was not enough. Efforts also had to be made to prevent their starvation. Programs to increase food production entailed expansion of water supplies, the introduction of fertilizers and biocides, and the conversion of vast forest reserves and grasslands into arable land. The science community has now made it clear that DDT, used so successfully in malaria eradication, is a health hazard for all forms of animal life. In many places, irrigation facilitated the spread of schistosomiasis into areas never before affected. Certain irrigation systems also produced laterite conditions in the soil that made previously fertile lands unusable. Agricultural pesticides and herbicides produced undesirable side effects, and experiments with alternative methods of biological pest control upset local ecological balances with devastating results. The conversion of forest lands to agriculture effectively destroyed valuable watersheds and created conditions much like those of the dust bowl of the United States in the 1930's.

Even where development programs have attained the desired results, they, too, have produced negative side effects. Dams and reservoirs for hydroelectric power plants upset the flow systems of natural rivers and changed grazing lands into useless swamps. The intensified use of materials and energy in new industry multiplied the sources of air, water, and soil pollution.

Rapid growth of cities produced noise, congestion, frustration, and the individual and group stresses that are manifested in mental illness and social disorders. In most areas governments were not able to cope with mass migration into the cities. Consequently, wretched slums have often become the habitat of people who once lived in greater dignity and better health on rural lands.

Improved education has made it possible for talented persons in the developing areas to emigrate. The resulting brain drain effectively deprives the poor countries of their investment in education. The spread of mass communication has made it possible for the impoverished to see, and to resent deeply, the disparity between their own condition and that of their rich, scientifically advanced neighbors.

Continuing development of science in the industrialized societies has also had a negative effect on the economies of the poorer countries. The creation of cheap substitutes for rubber, cotton, sugar, and leather, have undercut the developing countries' export market for these products. The advanced technology embodied in military hardware developed in the continuing expectation of violence, has placed additional strains on the budgets of the poorer countries whose leaders feel that they must acquire modern weapons even at the cost of continuing misery for their people.

This résumé of the past negative impacts of science and technology raises a question: What can and should the U.N. system do next? International organization is at a critical juncture in its rôle as a promoter of global well-being. Many of its technological interventions, generated in the spirit of humanitarian paternalism, have exacerbated, not solved,

human ills. Although the gulf between the rich and poor persists and is becoming wider, developmental assistance, as presently conceived, is no longer an adequate remedy for the health problems now confronting the globe.

The international science community, whose knowledge and skills set in motion the conditions for environmental disaster, now stands ready to reverse the negative trends. To accomplish that reversal, it will be necessary for peoples everywhere to join the scientists in a full partnership endeavor. They must come to realize the truth of the following propositions:

The population problem demands immediate action in all countries at whatever stage of economic development or land/man density;

The earth has a limited capacity for sustaining human life and Malthusian predictions will be verified long before human population approaches that finite point of no return; and

The world's resources cannot forever sustain economic growth at its present rate in an industrial regime which consumes exhaustible minerals and fuel.

If these basic premises are agreed upon, a series of consequential actions should follow. Among them are universal commitments to reduce the population growth rate to zero, to reach levels of food production adequate to maintain physical health and vigor among all members of that stable population, to retard industrialization in the richer countries while promoting its controlled growth in the developing countries, and to apply the entire apparatus of science and technology in the restoration and maintenance of a wholesome earth environment. What rôle can the U.N. system play in implementing such commitments? The suggestions set forth below may stimulate the search for alternatives.

#### ALTERNATIVES FOR THE NEXT TWENTY-FIVE YEARS

The U.N. system has already established specific programs aimed directly at the application of science and technology to world health and development. Among the alternatives for the future are maintenance of the existing patterns of assistance or their modification. The 1963 Conference on Application of Science and Technology for the Benefit of the Less Developed Countries concluded that the application of science and technology to development problems was a task for *all* the institutions in the development business.

The Conference rejected, however, another plausible alternative. It expressly denied that the skillful application of science and technology was "an appropriate province for a new and separate organization." The creation of a new agency may, nevertheless, be a feasible alternative to the present system. Such an agency could be formed as a completely new and autonomous entity without disturbing existing relationships and jurisdiction in the U.N. family of specialized agencies. On the other hand, economy and the need for central coordination may demand some degree of reorganization of agency functions.

Still another alternative could entail the assumption by the United Nations of functions never before exercised by international organizations. During the past twenty-five years, the U.N. system has operated passively by providing information, advice, recommendations, technical assistance, and financial aid upon request from Member States. International research has been conducted primarily on a contract basis with national institutions or individuals. Information-gathering and its transmission to international networks has been performed, if at all, by the voluntary cooperation of Member States. The development of skilled manpower has been accomplished by providing fellowships for nationals of one country to study or teach in another country. However valuable these passive and mediating rôles, the future may demand that the U.N. system undertake quite different functions. These could include the creation of a large, permanent international civil service for science and technology; the establishment of U.N. universities and scientific institutes; and the formation of a U.N. communications system. It may also be necessary to declare U.N. sovereignty over those parts of the earth that are not subject to national sovereignty and to impose a world tax to support new U.N. functions in the promotion of global health and welfare.

International society presently lacks the procedures and institutions necessary to protect the environment from destruction. Some international authority must ultimately decide on the standards of permissible levels of use and contamination of the high seas, the stratosphere, outer space, and the polar regions. Alternatives for the U.N. system in these matters may demand new initiatives, never before undertaken by international organizations. Alternative United Nations responses to the future needs of world health thus include (1) maintenance of the present aid system, with some programmatic changes, (2) the creation of a new agency with possible reorganizational implications for existing agencies in the U.N. system, and (3) the assumption of new functions by one or more U.N. organizations.

1. *New Programs.* The current emphasis of many United Nations programs is upon manpower use and development. A persistent question is how the talents of highly trained scientists and engineers can be rationally deployed for the use and benefit of the developing countries. Technical assistance programs provided by international organizations serve this purpose and should be continued. However, consideration should also be given to additional ways of augmenting skill inputs.

M. S. Thacker, president of the 1963 U.N. Conference on Science and Technology, suggested that a "world brain trust" of wise men be formed to examine the development plans of the various countries and to receive their progress reports.<sup>1</sup> Such a committee would be designed to overcome the presently unco-ordinated planning among numerous U.N. agencies. A brain trust, composed of great scientists and technologists and

<sup>1</sup> Report of the United States Delegation to the United Nations Conference on the Application of Science and Technology for the Benefit of the Less Developed Areas 259 (Prepared by AID for the Department of State, 1963).

the heads of the specialized U.N. agencies, could serve the useful function of co-ordinating U.N. programs without displacing them by the creation of a new operational agency.

Quite a different technique for making more productive use of existing skills and accelerating manpower development has been suggested by Sherman E. Katz.<sup>2</sup> A U.N. Science Corps could be drawn, he says, from universities, scientific institutions, industry, foundations, and professional groups in all of the developed countries.

Each person selected by the administering agency . . . would be given one to three years leave with full pay in order to work in a less developed area in one of two capacities: 1) as a member of a full-time team of experts sent to a national government for the formulation of development plans and/or science policy specially adapted to the national development objectives; or 2) as a member of a regional training center teaching practical scientific, management, and industrial skills in accordance with a curriculum designed by the countries of the region and doing extension work in the methods and adaptation of technology, particularly, in agriculture and industry.

Schemes such as this one for mobilizing men of knowledge in all fields as an élite corps to supplement the present efforts of United Nations technical assistance can take a number of forms. Consider, for example, the proposed International Volunteer Corps,<sup>3</sup> a U.N. Ecology Corps, or U.N. Exchange Professorships.

A third way to minister directly to health needs might be realized in the creation of a WHO Navy and Air Corps. The floating polyclinic and the helicopter ambulance have not been fully exploited by their creators. They do, however, serve important functions as diffusion agents for health sciences and technology. A U.N. peace fleet of hospital ships and a medical helicopter corps might be the first step toward sea and air-based U.N. ecological monitoring systems.

Still another approach could capitalize upon education. In the introduction to his 1969 annual report, U.N. Secretary General U Thant revived the notion of a United Nations university.<sup>4</sup> He recommended that the United Nations establish a number of international universities to further the development of science and technology. They would be staffed by professors from many countries and would include students from many nations and cultures. The university idea is not a new one, but as science and technology become the paramount themes of international co-operation, it may soon be implemented. Such an institution could serve as a productive training base to multiply the numbers of scientists and engineers in developing countries. It could also serve to relieve the

<sup>2</sup> Sherman E. Katz, "The Application of Science and Technology to Development," 22 *Int. Organization* 412 (Winter, 1968).

<sup>3</sup> 9 *War/Peace Report* 10 (Feb. 1969). See also Samuel P. Haynes, "An International Peace Corps: The Promise and Problems," The Public Affairs Institute, 1961.

<sup>4</sup> United Nations, Introduction to the Annual Report of the Secretary-General on the World of the Organization, June 16, 1968-June 15, 1969, at 44-45 (OPI/374-69-21161, Sept. 1969-15m).

tensions that are sometimes generated in bilateral education programs by eliminating the factors that give rise to charges of "academic colonialism."<sup>5</sup>

In view of the fact that several regional organizations are moving toward the creation of regional international universities and institutes, the most important question at this time is whether United Nations initiatives, designed to serve global needs, are likely to be frustrated by regional commitments among countries whose resources would be needed to support a U.N. university system.

2. *New Agencies.* At a recent Columbia University conference on water pollution, Professor Richard R. Baxter declared that the international agencies now in existence are incapable of dealing with the growing threat of pollution to the world's environment.<sup>6</sup> He called for the creation of a new entity, an International Environmental Authority, to deal with the world's stocks of water and air, and in general "with the maintenance of the quality of our world." Professor Baxter suggested that the mandate of such an agency might ultimately be extended to natural resources and to the serious problem of limiting the number of human beings on earth.

A similar recommendation was made in April, 1970, by George F. Kennan, former United States Ambassador to the Soviet Union.<sup>7</sup> He suggested the formation of an International Environmental Agency, having "great prestige, great authority and active support from centers of influence within the world's most powerful industrial and maritime nations" to protect the global environment. Such an agency would (1) maintain a world information center, (2) co-ordinate international research and operational activities, (3) establish international standards in environmental matters, and (4) prescribe and enforce suitable rules for all human activities in earth-space areas that are not now subject to the sovereign authority of national governments. What is needed, he said, is an entity with

an organizational personality—part conscience, part voice—which has at heart the interest of no nation, no group of nations, no armed force, no political movement and no commercial concern, but simply those of mankind generally, together—and this is important—with man's animal and vegetable companions, who have no other advocate.

A third organizational suggestion for the United Nations' undertakings in global science and technology has been made by the U. S. National Academy of Sciences and the National Research Council.<sup>8</sup> In their 1969 joint report, *Resources and Man*, they proposed:

That there be established, at an appropriate location within the United Nations framework, a high-level group of broadly qualified resource specialists and ecologists having the following duties—

<sup>5</sup> See Joseph Lelyveld, "Indian Academies Decry U. S. Impact," *New York Times*, Jan. 12, 1969, p. 7.

<sup>6</sup> *New York Times*, March 14, 1970, p. 31.

<sup>7</sup> George F. Kennan, "To Prevent a World Wasteland," 48 *Foreign Affairs* 405 (April, 1970).

<sup>8</sup> Committee on Resources and Man of the Division of Earth Sciences, National Academy of Sciences—National Research Council, *Resources and Man: A Study and Recommendations* (1969).

(a) to maintain continuing surveillance of both nonrenewable and renewable resources, particularly with regard to the future;

(b) to inform member states concerning impending shortages, problems of environmental deterioration, and other prospective developments affecting natural resources; and

(c) to recommend to the member states well in advance of crises optimum courses of action, not only for the avoidance of resource shortages and environmental catastrophe, but equally for the achievement of maximum social well-being and international harmony in the uses of resources.

A number of the elements included in these three suggestions for new programs and new agencies can be found in the 1970 joint report of the National Academy of Sciences and the National Academy of Engineering [NAS-NAE].<sup>9</sup> Although their recommendations were addressed to the creation of national institutions for effective management of the environment, their translation to the international level is a relatively easy one. The NAS-NAE proposal identified seven functions that must be accommodated by an agency designed to manage the environment: long-range planning, early warning, monitoring, quick-reaction field function, quick reaction analytical function, education, and communication. In order to carry out these functions, NAS-NAE recommended the creation of an Institute for Environmental Studies, an Environmental Monitoring Agency, and a Laboratory for Environmental Science.

3. *New Functions.* Several of the foregoing suggestions for new programs and agencies entail the assumption of new United Nations initiatives and responsibilities. A world brain trust would involve the broadening and strengthening of the United Nations' co-ordinating rôle. An élite volunteer science corps might require the development of new manpower management functions. The creation and management of United Nations peace fleet and medical helicopter corps, or an international university, would involve the United Nations system in distinctively new enterprising functions. Similarly, the new agency proposals reflect the need for United Nations monitoring networks, scientific institutes, and laboratories.

A United Nations move to shift full control over the diffusion of science and technology from national and regional initiatives to a multilateral entity would be a radical departure from its traditional practice.

A U.N. science agency would be responsible for managing the orderly flow of skills and resources among three groups of countries:<sup>10</sup>

1. States with a very poor educational system, no scientific-technological infrastructure of any value, no social consensus for the development of science and technology;

<sup>9</sup> *Institutions for Effective Management of the Environment*, Report of the Environmental Study Group of the Environmental Studies Board of the National Academy of Sciences and National Academy of Engineering, Part I (January, 1970).

<sup>10</sup> Jorge A. Sabato, "Some Comments on the Problem of the Best Utilization of Scientific and Technical Resources," Panel on Science and Technology, Ninth Meeting, Applied Science and World Economy, App. A, p. 521. Proceedings, Committee on Science and Astronautics, U. S. House of Representatives, 90th Cong., 2d Sess., Jan. 23-25, 1968.

2. States with an extended educational system, acceptable at the primary and secondary level, mediocre at the university level, a weak but existent scientific-technological infrastructure, a social consensus—at least nominal or rhetorical—for the development of science and technology; and
3. States where science and technology have been definitely incorporated into society and rank as an important element of their wealth, power, and prestige.

The United Nations, if it is genuinely committed to redressing these imbalances, to depoliticizing the patterns of co-operation and multilateral assistance among these states, and to eliminating duplication and redundancies here, omissions there, must have an agency with sufficient resources and a broad enough mandate to undertake functions heretofore left entirely to national or regional initiative.

A lesson can be learned from the experience of the OECD.<sup>11</sup> After World War II, as "big science" became too expensive for national budgets, the Europeans organized EURATOM, the space and launcher agencies, and many other joint operations on a cost-sharing basis. Because the rapid proliferation of this mode of co-operation occurred without central planning, it produced negative results. Some of the problems faced by smaller countries in integrating international scientific programs into their regular domestic science planning are illustrated by the following examples: (1) different entities were sometimes responsible for domestic and international programs; (2) two or more international agencies would begin projects in the same field and national representatives would not know about the others' work; (3) when the majority of the participants set the scientific objectives of the international enterprise, other participants were bound to pursue work in which they had little interest; and (4) the planning cycles of international programs did not always coincide with domestic planning and programs.

Presumably, a central U.N. agency could determine the priorities for particular programs, set the pace of proliferation, monitor the financial stress of individual country participation, and cushion that stress by direct aid from United Nations headquarters. It could also provide appropriate incentives for the efficient allocation of the skilled manpower brought into and produced by the United Nations-sponsored enterprise.

If a central U.N. agency is given the responsibility for co-ordinating world health and environmental programs, its allocation of funds for a balanced scientific and technological development should take into consideration the world's principal health needs. Preference should be given to programs that lead to (1) deceleration of population growth, (2) acceleration of food production and over-all economic development, and (3) control over disease and environmental pollution. At the same time, efforts must be made to ensure that all levels of scientific learning receive balanced support. In its rush to spread and adapt existing technologies,

<sup>11</sup> Statement of Dr. Alexander King, Director for Scientific Affairs, Organization for Economic Cooperation and Development, Panel on Science and Technology, *op. cit.* note 10 above, at 152-160.

the agency must not withhold support for basic research into areas of the scientifically unknown.

In his address at the 1967 Geneva World Conference on World Peace Through Law, C. Wilfred Jenks listed a number of special treaties that he predicted would become necessary as a response of the world community to current developments in science: a World Pollution Treaty, a Sonic Boom Treaty, a World Weather Treaty, a Center of the Earth Treaty, a Cybernetics Treaty, and a Molecular Biology Treaty.<sup>12</sup>

If such possibilities appear to belong to the realm of fantasy, let us recall how improbable an Antarctic Treaty appeared to be as recently as ten years ago, a Nuclear Test Ban Treaty as recently as five years ago, and a Space Treaty as recently as two years ago. We must measure the pause between the unthinkable and the accomplished by the rhythm of our own time.

He thereupon proposed that the General Assembly adopt a Declaration of General Principles Dedicating Science and Technology to the Service of Man, to be followed soon thereafter by a World Science Treaty. In that context, the suggestions made in this paper are modest indeed.

Whether a concerted drive toward strengthening the developing countries' health-oriented scientific programs is likely to be undertaken in this decade depends, in part, on the outcome of Sir Robert Jackson's proposal to shift funds from specialized agencies to the United Nations Development Fund.<sup>13</sup> In the future, the number of health and environmental problems will multiply at an increasing rate. If they continue to be dealt with in a piecemeal fashion, the result will be organizational chaos. Reorganization of existing agency functions in the formation of a new U.N. entity will create a variety of bureaucratic problems. Existing organizations have many legitimate interests in maintaining their responsibilities and the jurisdictional difficulties of disengaging functions from one agency and re-establishing them in another entity are enormous. Yet there is hope.

The General Assembly's decision to sponsor a U.N. Conference on the Human Environment in 1972 may be the most important step ever taken to mobilize the world's manpower and knowledge in the common effort to use science and technology for human well-being.<sup>14</sup> The conference will bring together governments from developed and developing areas in a genuine partnership to consider aspects of their common health and environmental problems that can only or best be solved through international co-operation and agreement. The agenda for that meeting promises to document a persuasive case for an international science program under United Nations auspices. In the interim, it is the privilege, indeed the duty, of those concerned with the future of man, to use creative imagina-

<sup>12</sup> C. Wilfred Jenks, "The New Science and the Law of Nations," 17 *Int. and Comp. Law Q.* 327 (1968).

<sup>13</sup> United Nations, *A Study of the Capacity of the United Nations Development System* (DP/5) 1969.

<sup>14</sup> *Problems of the Human Environment 4*, Report of Secretary-General, U.N. ECOSOC, 47th Sess., Agenda Item 10, May 26, 1969 (E/4667).



tion and technical craftsmanship of the highest order in the design of new ways to promote the goal of world health.

The CHAIRMAN thanked Professor Caldwell and introduced the commentator, Mr. Carroll L. Wilson, of the Massachusetts Institute of Technology.

MR. CARROLL L. WILSON. The topic today of the United Nations and Science is relevant in part because of the new decade and the new examination with respect to the effectiveness of its mechanisms, the way it operates, and how it can serve better. The papers we have heard suggest some ways in which the United Nations could better help in the science field.

At the United Nations Conference on the Application of Science and Technology in 1963, questions of the application of science and technology for the less developed countries were considered by 1500 delegates in 2,000 papers. A dialogue arose between the developed and the developing nations, but there was a great disparity in that dialogue because there were 200 French representatives and only two from Tanzania. There was a general proposal for a specialized agency of the United Nations for science and technology, but the predominant opposition maintained that science and technology affected all United Nations activities and could not be separated, just as a Department of Science within a country would arbitrarily separate science from the missions of respective national agencies. The final conclusion was that there would be established an Advisory Committee to the Economic and Social Council of the United Nations to advise it on the application of science and technology to development and to review the machinery of the U.N. system.

This Advisory Committee (ACAST) was composed of 18 members in 1964. Since then it has met for six to eight weeks every year. I was fortunate to have been chosen as one of its members. I have now far greater respect for the United Nations, for what it is and for its weaknesses, which seem to me to be similar to those of large bureaucracies generally. I would also say that if we were to start all over again, we would probably not arrive at a much better solution.

In examining the United Nations, we must remember that it is a functionally diffuse organization, with no controlling authority; it functions simply as a secretariat and not as an operating entity; its multinational civil service makes it a very rigid bureaucracy; and, most importantly, its ultimate control is political. The Committee on which I serve, though it advises ECOSOC, has no money, no pay, no budget and consequently limited power. There is one large source of money in the United Nations and that is the United Nations Development Program. In this regard, the recent analysis by Sir Robert Jackson has been most interesting. Likewise the *Pearson Report* has made a similar analysis on a broader spectrum and urged strengthening the World Bank.

The Advisory Committee on Science and Technology was formed to consider the application of science and technology to the less developed countries, but has become involved in all the United Nations science ac-

tivities, including the seabed, outer space, environment and many others. There is a working group within the Committee considering how to make the U.N. system more effective in science and technology. However, being realistic and looking back over the last ten years, we know that little readjustment will actually occur.

It is an appropriate question to consider the variety of other related and less cumbersome means of providing a forum for considering facts of a given situation. With respect to Professor Livingston's proposals, I would say that they are very interesting, but they would be new even on the national scene.

#### RECOMMENDATIONS TO ASSIST U.N. TECHNOLOGICAL ASSESSMENT:

1. *Bilateral Agreements.* Personally I would look first of all to special bilateral arrangements. For example, the United Nations Associations of the United States of America and of the U.S.S.R. are developing parallel studies on environmental questions. The aim has been to exchange papers and to consider common problems, though each Association issues its own report. The purpose is to get at least some common understanding as to the basic facts.

2. *Regional Organizations.* Secondly, I would look to regional opportunities, like the Organization for Economic Cooperation and Development (OECD). I have been chairman of the Committee on Scientific Research which has resolved problems which the United Nations could not have done. Recently, we have worked on a report on sonic booms. Sweden pressed the OECD to undertake this project, even though the United Nations has a specialized agency dealing with civil air transport matters, the International Civil Aviation Organization (ICAO). The Sonic Boom Panel of ICAO has failed to achieve any success working on an agreement on this problem. But the regional association of the developed states did stimulate action by seven member states to ban flight by commercial supersonic aircraft over their territories. In this regard the OECD undertook an extensive study on the sonic boom. A conference was held at which five states announced then a flat prohibition on overflight of sonic planes. Though the United States adopted this view, we abstained from taking a similarly strong stand.

3. *Non-Governmental Organizations.* Thirdly, I would suggest that non-governmental organizations might help to support, feed and strengthen the United Nations system of technological assessment. In this regard, there has been a devastating disease called trypanosomiasis or sleeping sickness, which is carried by the tsetse fly and makes four million square miles of Africa unusable. Even though in the United Nations system there are several entities like WHO and FAO which have had some responsibility over this issue, they were never able to gain sufficient specific focus to bring about the action required. In this case, just as with the Green Revolution in the area of rice and wheat, which was privately supported, a group of scientists has formed in Nairobi an International Center on Insect Physiology and Ecology. Their aim is to bring about research

on new methods of insect control through this private international agency. Such a center could never have been started through the regular United Nations system.

The challenge for today and for the future is how to bring about a change within existing organizations. We should consider that an array of regional, bilateral and non-governmental organizations could well achieve what the United Nations system as a whole could not alone achieve, even if it wanted to.

Mr. K. G. J. PILLAI (India). I support Mary Caldwell's view. I agree with her that international bodies can assess the uses and consequences of technology, but I remain skeptical of their effectiveness, even though the international community is really presently concerned about the environmental issues. For example, there are several United Nations organs like the International Civil Aviation Organization (ICAO), but what have they really done? The rates and fares are still controlled by airlines' secret meetings, which charge far too high prices. Reports indicate that they could reduce the price by 50% if they wanted to, but the ICAO does not touch this problem. Similarly, after talking about the regulation of transportation to avoid dangerous oil spills, the IMCO is still controlled by the shipping Powers themselves. Even GATT, which was supposed to increase trade for the good of all nations, has allowed restrictive trade practices to increase rather than decrease.

My point is that there is no use having a new agency which would have responsibility for health, air and water matters unless it has adequate enforcement powers. I suggest two points: first, that we should adopt the philosophy of Ralph Nader and select specific issues to achieve immediate action. For example, through a major propaganda drive international travelers could be made aware of the IATA, the private body of airlines. Fewer than 10% of travelers polled were even aware of its existence. If the people are not conscious of the problem, it is extremely difficult for the organization (ICAO) to exert much pressure on IATA. Secondly, as international lawyers, we should be able to develop the necessary tools and clarify the particular problems on which we should concentrate.

Professor CORNELIUS MURPHY. To the extent that an international agency would be involved in technological assessment, as Professor Livingston suggested, this agency would necessarily be concerned with the economic questions in any particular state, *i.e.*, it would be looking to what the industrial capacity of that state is. For example, on this Indian question, what power or pressure should be exerted on the international level, and how?

We must consider the *United Nations* context of this question. We must look to the government and private institutions in the economy because they are the ones which relate to the answer. For example, a Socialist government will give more power to a state agency than would the United States or another capitalist country.

With respect to Professor Caldwell's paper, I should like to examine

some of the dimensions of the population control problem. If we begin with a principle of respect for life, how do we approach the population explosion problem? We must consider *all* the empirical aspects. To date, scientific debate has failed to comprehensively consider these genuine needs and questions. We have usually considered the city and the slums only in the urban centers. If our approach is to be scientific, we must look to scientific research on urban concentrations in general. For example, there is a great disparity in the United States, since only 5% of the land is being used by 95% of the people. With modern technology, cities could be built in a manner other than the traditional nineteenth-century form. They could be built in the non-populated areas in accordance with a scientific plan.

With respect to the planet's resources, if we look in a scientific way, we must reflect upon the implications of scientific technology. Is man a planetary creature or a cosmic creature? If man is not just a planetary creature, we should change our attitude towards population increases.

We must also be conscious of the decision-making aspects of the general question. With respect to population control in domestic politics, it has been shown that, by raising the issue of population, politicians avoid the real issues of our times. The same is true internationally, for example, in India, population control is not the only problem nor even the major problem of Indian development.

Professor MARY ELLEN CALDWELL. The issues you have raised provide the framework for a good brief in support of spreading a basic science capacity among the developing countries. The developed, industrialized areas and the developing countries must participate in the evolving future as full-fledged partners.

Professor JOSEPH M. GOLDSSEN. If I understand Dr. Szalai correctly, I have a disagreement with him on his first thesis which he himself partially retracts in the later part of his talk. He asks: Does not the United Nations owe the social scientists a living? Meaning: Should not the United Nations create support for the significant help our disciplines are ready and *able* to give if only they were properly institutionalized? I think we are not owed a living and I question how able we yet are to solve the questions which seem so intractable to everyone else. Not even in the United States do we have support for the kind of "policy sciences" institutes so long proposed by our Chairman. I am tempted to suggest that the United Nations and its specialized agencies particularly examine whether they can assist the development of the social sciences so that eventually we can expect major rather than marginal help from these fields on international issues. Perhaps these agencies could call attention more effectively to the tendency (if so it proves to be) toward increased parochialism among social scientists rather than an increased international outlook. Can an international agency help interpret and perhaps correct the drift in American universities, for example, to lower and even abolish foreign language proficiency as a prerequisite for graduate degrees?

There are so many problems which could be studied without the almost

inevitably cumbersome structure of an international research institute and there are so many problems which can prevent the latter from recruiting and maintaining high quality staffs. If we can stimulate indigenous competencies across many borders and get good work done by co-ordinated but separate groups we might get a true international attack on international issues. Here I would reinforce what Dr. Carroll Wilson has said about the innumerable opportunities for bilateral, and even private research which in the aggregate can add up to an international equivalency.

Professor SZALAI. I would like to disagree with Professor Goldsen. First of all I did not retract my first thesis in the second half of my talk. Secondly, the knowledge in question is not present, especially not on the consequences of the proposals made here. For example, Mr. Wilson's hope for national, non-governmental and regional agencies feeding into an international agency, what do we know about the functioning and especially about the communications aspects of such a structure right now? Or concerning Professor Livingston's suggestion for INTAB, what do we really know in social science terms about the effects of research reports injected into the international policy-making processes? What do we know about that even on the national level?

Therefore I think research on international organizations is an absolute necessity and a duty. The United Nations should undertake such research itself within its own framework of organizations. Studies on the national level would not necessarily be relevant to the international sphere. Thus I think merely relying on production of new science tools will not prove fruitful. We need to look at how scientifically established facts can get into the policy-making processes without being neglected or altered.

Mr. WILSON. When I contemplate all the United Nations General Assembly resolutions based upon the numerous studies which have been made, I am impressed by their limited effectiveness in securing either national or international action. Without the willingness to take political action, such recommendations get little attention. In order to find out how some facts can be motivated and utilized properly, we must look to the political nature of the United Nations. Within the United Nations system the yield of action on recommendations is very low; thus we should look to other means for success. For example, the United Nations has looked at the population issue for some years. Even my own Advisory Committee had made a study, but no action was recommended. The United Nations Association of the United States recently made a detailed study and made a report. That report had far greater effect in getting both an office for a commissioner and the allocation of funds than all the United Nations recommendations. Thus I think that non-governmental organizations and these other inputs can be very effective in affecting United Nations policy.

Professor SZALAI. The United Nations is in a sense the "united establishments." Thus the relationship of science to social science on the national levels is reflected within the United Nations. The United States Government spends more money on science and operational research than

any other government, but what real influence does RAND and other think-tanks have on the United States Government? So what effect could such a group realistically have within the United States?

Dr. S. BHATT. With respect to the spread of science and technology in the advanced countries, and the problems associated with this advance, Professor Caldwell mentioned that there is need to retard the advance of industrialization. She also stated that there is need for dissemination of science and technology in other parts of the world less technologically developed. Her statements appear somewhat antithetical. Considering the "revolution of rising expectations" witnessed in less technologically developed countries, the United Nations may provide technological help for selective projects like population control, etc. The problem posed is: Should the United Nations help all-out industrialization in less developed countries or make selected goals?

Professor CALDWELL. The questions raised here may result in the defeat of my proposal. I suggested that the industrialized nations should retard their own growth potential and that the developing nations should be aided in the gradual expansion of an industrial capacity. This entails a global re-distribution of resource exploitation and use, and growth-oriented economists, investors, and business men in the developed countries are likely to resist an economic theory that espouses the *status quo* or retrenchment. Growth is the current symbol of progress and success.

Mr. GEORGE BRAND, Division of Human Rights, United Nations. I would like to mention a study, recently started in my Division, of the impact of science and technology on human rights. A preliminary report entitled *Human Rights and Scientific and Technological Developments* (Documents E/CN.4/1028 and Add.1-4, and Add.3/Corr.1) deals with developments in relation to surveillance devices, computers, medicine, biochemistry and biology, among other matters. This study is being carried out on an interdisciplinary basis. The aim is eventually to create international standards in these areas.

Professor VERNON L. FERWERDA. I would like to raise a question with respect to government representatives serving in a private capacity on various committees. Is there any need for national government assistance to these non-governmental representatives? Should a U.N. Commission of Governmental Representatives in science and technology be called for?

Mr. WILSON. There is always a great difference between an instructed government delegate and an uninstructed expert. At the recent session of the ACAST even the Russian representative has been speaking freely but only as an uninstructed expert. Our U.N. Committee has been composed of 18 men who served as experts and not as delegates instructed by their governments. There is a weakness in such a committee of experts and that is the limited ability to get action at home.

Professor FERWERDA. Should there also be a governmental representatives group?

Mr. WILSON. There is a proposal presently for a Governmental Com-

mittee on Science and Technology in ECOSOC. When that committee does meet it would have national experts as advisers.

Professor JOHN HANESSION, JR. With all the uncomplimentary statements about the United Nations this morning I should like to say something positive, especially concerning the work of the Secretariat. As an example, I might refer to some personal observations based on the past three years' association with the personnel of the Outer Space Affairs Division. During this time I have been very impressed not only with their efficiency but also with their innovative spirit. This has been especially true during this past week when these professional international civil servants have been working with the instructed delegates from over 25 countries, which are represented on the Scientific and Technical Subcommittee of the General Assembly's Committee on the Peaceful Uses of Outer Space. This Subcommittee has been engaged in discussing the extremely complex technical and organizational problems which are being uncovered by the developing Earth Resource Survey Satellite Program. The Secretariat staff have demonstrated unusual skill and tact during these discussions.

The CHAIRMAN thanked members of the panel and those members of the audience who had attended for their participation in the discussion and then brought the session to a close.

#### FOURTH SESSION

Saturday, April 25, 1970, at 2:15 p.m.

#### The United Nations and Disarmament

The session convened at 2:25 o'clock p.m. in the Jade Room of the Waldorf-Astoria Hotel, Dean Adrian S. Fisher, Georgetown University Law Center, presiding.

The CHAIRMAN warned that the subject before the panel would be construed rather broadly. The relationship of the United Nations to arms control and disarmament matters has been quite varied. Sometimes, it has been procedural in character, as in the United Nations' endorsement of the Eighteen-Nation Disarmament Committee (ENDC).<sup>\*</sup> In other areas, the United Nations has had a hortatory relationship—for example, its efforts to encourage negotiations, both in general and between the United States and the Soviet Union.

Pointing out that the United Nations rôle can be significant even though indirect, Dean FISHER recalled the negotiations on the Non-Proliferation Treaty. Probably, a critical development in making that treaty possible was the U.N. resolution of December, 1967, which was a compromise between two competing drives: one, to delay negotiations on the treaty until after the scheduled Conference of Non-Nuclear-Weapon States; the other, to urge the United States and the Soviet Union to get back to the bargaining table and discussions in the Eighteen-Nation Disarmament Committee in order to come up with an agreed treaty draft in a hurry. These two approaches were resolved through informal meetings among a group of their sponsors. These negotiations were rather like a floating crap game. The meetings took place during Saturday and Sunday, December 16-17, in the Security Council chamber while the U.N. guided tours were going in and out, prompting a Soviet comment that the delegates were engaged in a "secret conspiracy, openly arrived at." The discussions brought about a harmonization of views: The ENDC was given until March 15, 1968, to come up with a draft for the treaty, to be referred to a resumed session of the U.N. General Assembly. At the same time, it was agreed that the Conference of Non-Nuclear-Weapon States would meet in the summer of 1968 and the United States and the U.S.S.R. would support the Conference. Agreement was reached in the Disarmament Committee by mid-March, the United Nations acted in June, and the treaty was signed in July.

Chairman FISHER observed that one could not discount the rôle of the United Nations in its influence on the negotiators and this was even true of the U. S.-Soviet negotiations on strategic arms limitations (SALT), currently under way in Vienna.

<sup>\*</sup> Although not created by the United Nations, the ENDC has been treated as a body reporting to the Organization. It is now known as the Conference of the Committee on Disarmament (CCD), and is composed of 26 states, although one, France, does not participate.



The CHAIRMAN then called upon the first speaker, Mr. Charles Van Doren, Deputy General Counsel, U. S. Arms Control and Disarmament Agency.

## U.N. INVOLVEMENT IN DISARMAMENT: THE CASE OF THE NON-PROLIFERATION TREATY

*By Charles N. Van Doren\**

It has often been said that we in the disarmament field are sailing an uncharted course. To try to dispel this illusion, I have distributed a set of charts to help give direction to my remarks this afternoon. The first is intended to give you a rough idea of United Nations involvement in the principal disarmament developments of the 1960's. Across the top I have listed all of the disarmament measures that have been embodied in treaties, three that hopefully will reach that stage before long, and a few others that have been widely discussed but without any measurable success.

It is clear from this chart that, as Dean Fisher pointed out, there has been wide variation in the extent to which the United Nations has been involved in the development and negotiation of these measures. The only one of the disarmament treaties that was negotiated entirely in the United Nations itself was the Outer Space Treaty. At the other extreme are measures of a bilateral nature, such as the hot-line agreement, in which there has been no real United Nations involvement.

But the feature of this chart on which I would like to dwell today is the large variety of ways in which the United Nations can get involved in disarmament efforts. Probably the best illustration of this point is the Non-Proliferation Treaty, and I shall devote the balance of my remarks to the various types of United Nations involvement in that treaty.

First, the idea of a treaty in which the states possessing nuclear weapons would agree not to disseminate them, and the states that do not have them would agree not to acquire them, was tossed about in the United Nations for a number of years. It was an element in a package disarmament proposal offered by the United States in 1957. And it was the subject of General Assembly resolutions in 1959, 1960 and 1961.

Second, studies by the Secretary General made a significant contribution to the understanding of the need for such a treaty and to its acceptability by non-nuclear-weapon states. The first of these was a survey made in 1961-1962, to which 62 Member States responded, of the conditions under which countries not possessing nuclear weapons might be willing to enter into specific undertakings to refrain from acquiring or receiving them. The second was an excellent report, published in 1968, on "Effects of the Possible Use of Nuclear Weapons and the Security and Economic Implications for States of the Acquisition and Further Development of these Weapons."

The third type of United Nations involvement in the Non-Proliferation Treaty consisted of negotiations. While none of the following organs was

\* Deputy General Counsel, U. S. Arms Control and Disarmament Agency.

the principal forum in which the provisions of the treaty were worked out, the text of the treaty was discussed over a period of several years in the First Committee, the General Assembly, and the U.N. Disarmament Commission. A number of amendments that added to the central provisions of the treaty were adopted as a result of the discussion in these United Nations bodies.

But to an even greater extent the treaty was negotiated at the Eighteen-Nation Disarmament Committee in Geneva. This was *not* a United Nations body, but a special committee established with the blessing of, and reporting to, the United Nations. Moreover, the United Nations financed and provided the administrative support for this conference, including the use of U.N. conference facilities at Geneva and documentary and translation services. This is the *fourth* type of United Nations involvement in disarmament efforts. Another extra-U.N. conference relating to the Non-Proliferation Treaty which received this kind of support from the United Nations was the Conference of Non-Nuclear-Weapon States held in 1968.

The fifth type of U.N. involvement in the Non-Proliferation Treaty was its review of the reports of these extra-United Nations conferences, leading, over several years, to resolutions calling upon such conferences to press on with the negotiating task and report back by specified dates. Dean Fisher described how one of these deadlines was set, and noted that it provided an essential spur to completion of the negotiations.

Sixth, when the treaty negotiations were completed, the U.N. General Assembly helped by demonstrating the near universality of support for it and by urging states to adhere to it.

Seventh, the Security Council played a rôle in connection with the Non-Proliferation Treaty by adopting a resolution designed to assure states forgoing the right to acquire nuclear weapons that aggression against them with nuclear weapons, or the threat of such aggression, would be met with immediate action by the Security Council.

The seven kinds of United Nations contribution that I have discussed helped materially to bring the treaty into force. But there still remains a considerable amount of unfinished business under the treaty.

First, Article VI of the treaty calls for negotiations toward curbing the nuclear arms race. The success of the treaty depends in part upon successful efforts by the nuclear Powers to bring their competition in nuclear armaments under control. Our current efforts in this direction are the SALT talks, on which Mr. Halperin will be speaking to you.

Second, there is a fascinating task ahead in working out the arrangements for international observation and other procedures and international organizational arrangements under which peaceful nuclear explosion services can be made available under Article V of the treaty. Here the United Nations involvement is expected to be primarily through the International Atomic Energy Agency (IAEA), which has already started addressing these matters.

And finally, there is the tremendous challenge presented by Article III of the treaty, which requires all non-nuclear-weapon states party to it to negotiate agreements with the IAEA providing for international safeguards

on all of their peaceful nuclear facilities. Until such negotiations are completed, it might be said that we have only half a treaty. This is so both because the contemplated agreements with the IAEA are the principal means of verifying compliance with the treaty, and because most of the countries with a potential capability to make nuclear weapons have not yet ratified the treaty and have made it clear that they will not do so until the safeguards arrangements are worked out.

Time does not permit my going into the numerous problems that these negotiations will have to resolve. But a glance at the other charts which I have distributed will give you some idea of the scope of the tasks and some of the interests that must be accommodated.

Forty-eight present parties to the treaty have undertaken to commence negotiations with the IAEA by September 1 of this year, and to complete them by March, 1972. Relatively few of them have many peaceful nuclear facilities to be safeguarded. But the agreements will have to be flexible enough to cover future developments in these countries. They must also be made compatible with the bilateral agreements under which nuclear materials are supplied to these countries by the United States and other suppliers. In addition, the safeguards agreements with parties to the Latin American Nuclear Free Zone Treaty (LANFZ) will also have to satisfy the requirements of that treaty.

The bargaining position of these 48 countries may also present a problem, since they have only 6 seats on the 25-member Board of Governors of the IAEA. And problems may arise from the fact that one quarter of these 48 countries are not even members of the IAEA—including the “German Democratic Republic,” whose bid for membership would present obvious problems.

In Chart C (non-nuclear-weapon states which have signed but not ratified the Non-Proliferation Treaty) even bigger problems become apparent. Some of these countries already have a significant nuclear power industry. Five of them are members of EURATOM, which considers that its existing multinational safeguards system entitles it to special treatment. But other key states, such as Japan and Australia, have made it clear that their ratification of the treaty will be deferred until they know what the IAEA-EURATOM agreement looks like, and until they are satisfied that they get no less favorable treatment.

Of the 25 members of the IAEA Board of Governors, 8 have signed but not ratified the Non-Proliferation Treaty and a similar number have not even signed the treaty.

Finally, there is a problem posed by the offers made by the United States and the United Kingdom to accept IAEA safeguards on all their nuclear facilities other than those directly involved in their national security. The facilities subject to these offers outnumber the facilities of all the other countries combined. On the one hand, this may lead to arguments as to who will bear the costs of safeguards, and on the other, there will be considerable pressure from potential competitors such as Germany and Japan to see that the offers are fully implemented.

The IAEA is preparing to face up to these problems. At a special meeting of the Board of Governors this April it set up a committee, open to any interested members of the IAEA, to consider them. It is scheduled to start meeting on June 13, and to have its initial report ready by the end of July. The United States has been doing intensive work in preparation for these meetings, where it intends to act as an honest broker, hoping to bring all the different factions together in a way that will provide effective verification of the treaty. The stakes are high, not only because of our considerable political investment in this treaty, but also because of the importance of its effective implementation to reducing the chances of nuclear conflict. So I hope you will join in wishing us luck!

The CHAIRMAN introduced the second speaker, Professor George Bunn, University of Wisconsin, former General Counsel, U. S. Arms Control and Disarmament Agency.

## THE BANNING OF POISON GAS AND GERM WARFARE: THE U.N. RÔLE

*By George Bunn \**

President Nixon announced late last fall that he would give the Senate an opportunity to reconsider its failure to ratify the Geneva Protocol of 1925 prohibiting the use in war of poison gas and germ weapons. His announcement was part of the quickening, world-wide interest in the Protocol—an interest spurred by debates at the U.N. General Assembly and at the Geneva Disarmament Conference, as well as by American use of tear gases and chemical defoliants in Viet-Nam. My purpose today is to set forth briefly the history of the Protocol, the current issues of interpretation, and the contribution to the Protocol of the United Nations and its predecessor, the League of Nations.<sup>1</sup>

The Protocol prohibits (1) the use in war of “asphyxiating, poisonous, or other gases, and of all analogous liquids, materials or devices”; and (2) the use “of bacteriological methods of warfare.” Whether the phrase “or other gases” includes *all* other gases, and therefore tear gases, or just *similar* other gases, but probably not tear gases, has been a matter of controversy for a long time.<sup>2</sup> Whether the Protocol also prohibits chemical defoliants, which were unknown when its language was drafted, is also in disagreement.

The phrase “or other gases” was drawn from the Treaty of Versailles

\* University of Wisconsin; former General Counsel, U. S. Arms Control and Disarmament Agency and Alternate Representative, Geneva Disarmament Conference.

<sup>1</sup> A more detailed exposition, with appropriate citation of authority, appears in Bunn, “Banning Gas and Germ Warfare: Should the United States Agree?”, 69 Wis. Law Rev. 375 (1959).

<sup>2</sup> To add to the difficulty, the French text substitutes “similar” (“gaz asphyxiantes, toxiques ou similaires”) for the “other” of the English text. Yet the French interpret the Protocol as banning tear gas.

and the other peace treaties of World War I. There was no recorded discussion of tear gas or defoliants at the peace conferences. Tear gas was, however, well known by police at that time and was probably the first gas used in the First World War.

In the 1922 Washington Conference on naval ships, the United States proposed the negotiation of a treaty banning poison gas which would have application to the World War I victors as well as to the countries covered by the World War I peace treaties. The records of the 1922 Conference contain no discussion of the possibility of using chemicals to destroy the crops of the enemy. There was, however, a discussion of tear gas. An American citizen's advisory committee felt that, unless *all* gases were prohibited, there would be a danger of escalation from tear gases to more injurious gases. A U. S. Navy board also pointed to the difficulty of drawing any line unless all gases were clearly prohibited. Both these reports were referred to at the conference. But rather than drafting new language which might more clearly have prohibited all gases, the Conference adopted the Versailles language—"or other gases"—because so many countries had already agreed to it by signing the earlier peace treaties.

The 1922 Treaty never came into force because the French, in disagreement over its provisions on submarines, failed to ratify. In 1924, the League of Nations appointed a committee of experts to study the problem again. This group discussed tear gases, saying they caused no permanent disablement and were in use by national police departments. They also discussed possible damage to crops from chemical agents. They were aware of no such agents then existing which would destroy crops.

At a 1925 League Conference, the United States again proposed a ban on poison gas. The Geneva Protocol resulted. Again, the Versailles language—"or other gases"—was used, a ban on bacteriological warfare being added. At the conference, there was no recorded discussion of tear gases or chemical defoliants, although the experts' report was presumably available to the participating governments.

Perhaps because the 1922 Treaty had been approved by the Senate without dissenting vote, the Executive Branch did not make the effort to gain support for the 1925 Protocol that had been made in 1922. The Army's Chemical Warfare Service felt free to mobilize opposition to the Protocol. It enlisted the American Legion, the Veterans of Foreign Wars, the American Chemical Society, and segments of the chemical industry. The Chairman of the Senate Military Affairs Committee led the Senate opponents of the Protocol. He argued that it would be torn up in time of war, and that poison gas was, in any event, more humane than bombs and bullets. Senator Borah, Chairman of the Senate Foreign Relations Committee, finally withdrew the treaty from Senate consideration, apparently because he could not muster the necessary two-thirds vote. Ben Cohen, an American disarmament representative during the 1952 United Nations debate on gas warfare, explained:

When the Geneva protocol was submitted to the Senate for ratification, America was retreating rapidly into isolationism and neutralism and

feared any involvement with the League of Nations and any treaties originating in Geneva.

But the Protocol came into force in the twenties without the United States. In 1930, a League conference to prepare for the later Geneva Disarmament Conference attempted to resolve the differences over whether it barred tear gases. Twelve countries, including the British, the French, and the Soviets, agreed that it did, many of them making clear that they did so because of the difficulty of drawing a line between lethal gases and tear gases. Only the United States, which was not a party to the Protocol, questioned this view. The American representative said that he thought many governments

would hesitate to bind themselves to refrain from the use in war, against any enemy, of agencies which they have adopted for peacetime use against their own population, agencies adopted on the ground that, while causing temporary inconvenience, they cause no real suffering or permanent disability, and are thereby more clearly humane than the use of weapons to which they were formerly obliged to resort in times of emergency.

A majority of the countries represented at the conference remained silent on this point, although a majority of those which were parties to the Protocol agreed with the British that tear gas was prohibited. The conference report recognized that the question remained open. The focus of discussion at the League's Disarmament Conference turned to the drafting of new treaties to regulate not only the use of gas and germ weapons but also their production, importation and stockpiling. A consensus was achieved that, in such a treaty, tear gas should be prohibited for use in war but not for domestic riot control. The United States finally agreed. However, no treaty to this effect ever went into force. The Geneva discussions of the thirties ultimately broke up in failure after the Germans withdrew and the storms of war began to gather.

Many persons credit the Protocol with a major rôle in preventing gas warfare in Europe during World War II. It symbolized the abhorrence for gas which both military men and civilians had after World War I. If fear of retaliation was the primary sanction acting to deter the use of poison gas and germs, the Protocol established the norm of conduct. It placed chemical and biological agents in a special class and provided a standard for the belligerents to follow. Unlike World War I, no gas warfare occurred among the industrial states of Europe in World War II.

At the beginning of American participation in World War II, the State Department became concerned that the Japanese, not being parties to the Geneva Protocol, would engage in chemical warfare. The British, French, Italian, and German Governments had exchanged pledges to observe the Protocol. The British had made the same offer to Japan, but it had replied evasively. The Chinese charged that the Japanese had used gas in China. President Roosevelt therefore announced that the United States condemned the use of poison gas as "outlawed by the general opinion of civilized man-

kind." He said this country would not be the first to use these weapons but threatened swift retaliation if such gases were used against the United States or any of its allies. The Japanese replied through neutral diplomatic channels that they would refrain from the use of gas if America and its allies would do so.

The Joint Chiefs gave consideration to using gas toward the end of the island war in the Pacific but they never sought the necessary authority from President Truman. No gas, even tear gas, was used by the United States in World War II or in the Korean War, although field commanders in both wars had asked for permission to do so. American forces were charged by the North Koreans with germ warfare. But the United States denied the charge and North Korea refused to admit a U.N. team attempting to verify it.

The United States, South Viet-Nam and Australia have used tear gases in Viet-Nam as have the North Vietnamese and the Viet-Cong. Our side was the first to do so. American use was justified on "humanitarian grounds": that it would reduce the number of people killed, particularly noncombatants, and that it would be analogous to riot control. The authorized justification given by the United States during a General Assembly debate stated that international law did not prohibit "the use in combat against an enemy, for humanitarian purposes, of agents that Governments around the world commonly use to control riots by their own people."

Where Viet-Cong were protected by human shields, or by tunnels or caves, the alternatives were machine guns, napalm, high explosives, or fragmentation grenades. Tear gas certainly seemed a more humanitarian weapon. But, after the humanitarian justification had been made, reports from Viet-Nam described tear gas attacks on Viet-Cong strongholds attacks which were followed, before the gas cleared away, by artillery shells and high-explosive bombs. The purpose of such attacks would appear to be to flush out those hiding in tunnels (whether civilians or combatants), to incapacitate them with gas and, rather than capturing them, to wound or kill them by shells and bombs. This seems wholly inconsistent with the humanitarian justification given earlier by the United States.

Somewhat the same thing has happened with the defoliants which the United States is also using in Viet-Nam. The American Delegation to the United Nations justified their use "to control weeds and other unwanted vegetation," saying that they "involve the same chemicals and have the same effects" as weed killers used domestically in the United States. At first, defoliants were used in Viet-Nam to destroy jungle trees and plants, particularly along roads, because this vegetation was used as a cover by enemy troops from which to attack American and allied soldiers. This was not unlike the common use of defoliants to kill weeds along highways in this and other countries. Gradually, however, the South Vietnamese and then the Americans began using herbicides to kill rice crops in Viet-Cong-held areas. Although the chemicals remained the same as those used for certain domestic weed killers, the use was no longer "to control weeds and other unwanted vegetation," the justification given by the United States

to the United Nations. As with tear gases, the American political rationale had been eroded by its military practice.

The United States has never taken the view that it could use tear gas and defoliants in Viet-Nam because it was not a party to the Geneva Protocol of 1925. Instead the American Delegation said that these agents were not prohibited by the Protocol, adding that the United States supported the objectives of the Protocol. The United States voted for a 1966 U.N. General Assembly resolution which called for "strict observance by all states of the principles and objectives of the Protocol" and condemned "all actions contrary to those objectives." A United States delegate stated that, "while the United States is not a party to the Protocol, we support the worthy objectives which it seeks to achieve." Following this resolution, the State Department took the view that the "basic rule" set forth in the Protocol "has been so widely accepted over a long period of time that it is now considered to form a part of customary international law."

In 1968, pursuant to a resolution of the General Assembly, U Thant appointed a group of experts to study the effects of chemical and biological warfare. Their report greatly increased international interest in the subject. In his foreword to the report, U Thant made two proposals related directly to the Protocol: (1) That renewed appeals be made to all countries to join the Protocol; (2) That a clear affirmation be made that the Protocol prohibits the use in war of *all* chemical and biological agents, "including tear gas."

As to U Thant's *first* proposal—that all should join the Protocol—an increasing number of nations have become parties in recent years. Some 20 have done so since the 1966 U.N. resolution asking all to adhere. Others, including the United States and Japan, the only major industrial countries which are not parties, are preparing to do so.

U Thant's *second* proposal was to make clear that the Protocol prohibited the use in war of *all* chemical and biological agents. Last December, following debate in Geneva and New York, the General Assembly adopted a resolution which declares that the use of "any chemical agents of warfare" which "might be employed because of their direct toxic effects on man, animals or plants" is prohibited by the generally recognized rules of international law embodied in the Protocol. The debate made clear that the sponsors of this language designed it to include both tear gas and defoliants. The vote was 80-3, with only Australia and Portugal joining the United States in opposition. Thirty-six countries, including many U. S. allies, abstained. Since that time, the British have announced that they do not view the modern tear gas, CS, as covered by the Protocol. CS is the main tear gas we are currently using in Viet-Nam. It is also the gas used by the British to quell rioters in Northern Ireland.

As President Nixon prepares to resubmit the Protocol to the Senate, there continues to be disagreement over whether it covers the two kinds of chemical weapons we are now using in Viet-Nam, tear gases and defoliants. Many believe the United States should here and now forswear any further use of these agents in war.<sup>3</sup>

<sup>3</sup> The United States has recently withdrawn one defoliant from use there.



Looking into the future, the arguments for a broad renunciation of this kind are strong. If the Americans, British and a few others hold open the option to use CS or other tear gases, countries which now have little or no gas capability will probably acquire gas masks, gas grenades, gas dispensers, gas projectiles and other delivery equipment, as well as expertise in the use of gas. After this happens, it will be far easier in future conflicts to escalate from tear to poison gas. And for ease of administration in war, a simple rule—"no gas of any kind"—is best. Yet, while America is still engaged in a war in which chemical agents may be saving American lives, a decision by the President to give up further use of these agents does not seem to be in the cards.

If the President submits the Protocol to the Senate while insisting upon an American reservation as to tear gas and defoliants, he may nullify much of the beneficial effect of Senate ratification. Some important countries which disagree with our view on tear gases and defoliants may reject the United States as a party to the Protocol. Other countries which object to the reservation may accept the United States as a party but prevent the provision of the Protocol which relates to the reservation, probably the "other gases" phrase, from applying in treaty relations between the two countries to the extent of the reservation. Moreover, our reservation would likely promote further diversity in interpretation of an instrument which should receive uniform construction to operate most effectively. The U. S. position would in any event face such hostility that much of the international good will which might otherwise accompany American ratification would be destroyed.

On the other hand, if the United States could accept third-party settlement of the controversy, this should not happen. If the Protocol were submitted to the Senate with a simple statement of the U. S. view, and if the United States was thereafter prepared to abide by an advisory opinion of the International Court of Justice, assuming other countries would do so, differences of interpretation of forty years standing might be reconciled. The United States' action would then be correctly regarded as a major contribution toward strengthening an important accomplishment of the League and the United Nations—a treaty which is the oldest major multilateral arms control accord still in effect.

In introducing the third speaker, Mr. Morton Halperin of The Brookings Institution, the CHAIRMAN commented that probably no negotiations were more important to the security of the world than the present strategic arms limitations talks (SALT) between the United States and the Soviet Union. As Deputy Assistant Secretary of Defense in International Security Affairs, Mr. Halperin had been the principal representative of the Defense Department in the Committee of Deputies which had worked up the U. S. proposals for the talks that had not taken place in 1968. The events of that August in Czechoslovakia had been a great tragedy. They were tragic in their own right but also brought about a fifteen-months' delay in these important negotiations at a point when time is running out.

## PROSPECTS FOR SALT

*By Morton H. Halperin \**

An agreement limiting the strategic offensive and defensive systems of the United States and the Soviet Union would go to the heart of the security concerns of the two countries. Thus, any such agreement will be carefully evaluated by those in the military establishment and others concerned with security and the design of weapons systems, as well as by those in the Foreign Office who normally would be concerned with disarmament matters. In the most general terms, both the United States and the Soviet Union would have to be convinced that an agreement protected its security and that it did not provide for any gross inequality in favor of the opposing side. More specifically, each side would insist that the agreement provide it with a confident deterrent capability. This means three things.

First, the agreement must leave each side with high confidence in its ability to survive an enemy first strike and still launch an overwhelming retaliatory blow against the other. That is, no matter how effective may be the first strike of the enemy, the responding side must be able to destroy a large part of its society. Both the United States and the Soviet Union appear to have agreed at the SALT talks that this was the foundation of strategic stability and that the agreement must assure both sides of a secure retaliatory capability. Second, the agreement must not create a situation in which one or both sides would be tempted to pre-empt during a crisis. That is, it must leave both sides with a strategic force which is capable of remaining in a high state of alert during a crisis and need not be used quickly. Third, and closely related to this, is the fact that the agreement must not create a situation in which there is strong incentive to strike first. The amount of damage that each side suffers must be essentially the same, no matter which side strikes first. If there is a strong incentive to strike first, then one or both sides may be tempted to consider a first strike out of fear that the other side may be planning a first strike in order to reduce the damage to itself.

The criteria suggested so far are the same that the United States and, presumably, the Soviet Union would use in evaluating their strategic forces in the absence of an agreement. While both sides believe that they can maintain an effective deterrent in the absence of an agreement, they nevertheless have both indicated great interest in seeking to do so with an agreement. This is because some additional benefits could accrue from a formal agreement or a tacit understanding limiting the strategic forces of the two sides.

The political implications of a formal strategic arms control agreement between the United States and the Soviet Union have undoubtedly been important to some advocates of an agreement. A strategic arms control agreement could substantially improve the political climate between the United States and the Soviet Union and pave the way for other agreements

\* Of The Brookings Institution.

on matters relating to security, including the security of Western Europe. Others fear that a strategic arms control agreement would be exploited by the Soviet Union to increase the sense of concern in Western Europe about whether or not the United States' strategic deterrent is effective against Soviet threats to Western Europe. Some suspect that this is an important Russian motivation for seeking an agreement and that NATO might not survive a SALT agreement.

Those who favor an agreement point to the fact that, in the absence of an agreement, each side will feel obliged to continue to increase the size of its strategic forces. In order to defend such increases domestically the government will be forced to justify its efforts by rhetoric which implies the possibility of serious conflict between the two countries. It is argued that improved political relations are difficult in a climate in which military leaders are making strong statements about the strategic threat from the other.

Another strong motive for a formal strategic arms limitation agreement is the likely effect on the proliferation of nuclear programs. During the course of negotiation of the Non-Proliferation Treaty non-nuclear Powers insisted that an operative clause be written into the treaty requiring the nuclear Power to engage in serious negotiations aimed at limiting the nuclear arms race. Many believe that the Non-Proliferation Treaty will not be effective unless there is also nuclear arms limitation by the major Powers. Thus, a formal agreement is seen as an important step in preventing the spread of nuclear weapons.

The desire to reduce expenditures has probably played some rôle in motivating interest in strategic arms limitation. This appears to be particularly the case in the Soviet Union. Soviet political leaders must be concerned about the growing pressure on the strategic arms budget coming from the growing sluggishness of the Soviet economy and the growing demand for consumer goods, as well as the need for increased expenditures for general purpose forces, in light of the Soviet invasion of Czechoslovakia and the growing military tensions on the Sino-Soviet border. Strategic arms expenditures are a significant part of the Soviet defense budget and used a substantial portion of the available resources of advanced technology, including computers. Russian leaders have suggested that the desire to save money is an important component of their interest in strategic arms limitation. Cost appears to be much less important in the United States. The strategic forces cost approximately \$15 billion per year and are therefore less than a third of the defense budget. Moreover, it is unlikely that a strategic arms limitation agreement would permit a reduction of more than \$3 or \$4 billion in strategic spending. Such an amount could more easily be saved from the much larger general purpose force budget. Nevertheless, in the absence of an arms control agreement it is possible that strategic expenditures in the United States would greatly increase over the next ten years, and this increase would be difficult to finance in view of the increasing pressure on the defense budget.

Another motive for seeking to regulate the arms race by formal inter-

national agreement is to reduce the great uncertainties in the arms competition. Both the United States and the Soviet Union know reasonably well what strategic forces the other side has at any given time, and the Soviet Union has a considerable amount of information about the future strategic intentions of the United States. However, the Soviet leaders could not be sure whether the United States will build a new manned bomber or a large ABM system over the next six or seven years in the absence of an agreement. The United States knows even less about the future strategic plans of the Soviet Union. Thus, each side must find ways to hedge against the possibility that the other side will engage in a rapid build-up of its strategic forces in the future. This uncertainty forces each side to build more than it would build if it had good knowledge of the other side's intentions, and in turn stimulates greater expenditures by the other side. A formal agreement which would give each side higher confidence in the other's intentions could reduce these uncertainties which lead to unnecessary expenditures and generate fear of what the other side may be doing.

Perhaps the most important argument for formal arms control agreement is that it would reduce the probability of nuclear war. This is so if an agreement can prevent future developments which would make war more likely. From this perspective, interest focuses primarily on two new developments in the strategic arms race—MIRVs and ABMs. Most analysts have argued that a strategic arms control agreement should be designed to prevent deployment of MIRVs and ABMs, since introduction of either would make nuclear war more likely. ABMs increase the probability of war by giving one side or the other the illusion that it could survive a retaliatory strike by the other. MIRVs affect stability by creating an incentive to strike first. Either side with a MIRV force might be able to destroy the fixed land-based missiles of the other side. There is no question that both MIRVs and ABMs, and particularly the two of them in combination, would increase the probability of war according to strategic calculations, and hence an agreement which prohibited one or both systems could serve to reduce the probability of war.

However, neither American nor Soviet political leaders are likely to make a decision to go to nuclear war on the basis of strategic calculations. The top political leaders of both sides understand that both nations would be destroyed in a nuclear war. Neither side would start a war on the belief that it could suffer relatively less damage than the other side. Only if the political leaders came to believe that there was a substantial chance of escaping without any damage, and if they believed that the alternative to beginning a nuclear war was very horrendous, would they consider the possibility of launching a pre-emptive first strike.

From this perspective, the key to avoiding nuclear war is to avoid a situation in which a very harassed and very panicky political leader might, during a severe crisis, allow himself to be convinced by his advisers that he could start a nuclear war and suffer no damage. An arms control agreement should be designed to prevent this situation from occurring. At the

present time it is clear that no political leader could possibly be convinced that after a first strike he would not suffer heavy damage in return. If one looks at possible future changes in technology, it is clear that only with a large ABM system might a political leader be persuaded that he could escape damage. Having spent large sums on a ballistic missile defense system and having been told by those advocating such expenditures that the system would work effectively, political leaders easily come to overestimate in their own minds the efficacy of ballistic missile defense. In a time of crisis they might be told that the first strike would penetrate the enemy's ABM system because it would be large enough to saturate the defense. The enemy's counter-strike, however, would be sufficiently small that the ABM system would provide an impenetrable shield, shooting down all of the incoming missiles. While such an evaluation would almost certainly overestimate the technical capabilities of an ABM system, political leaders, led over time to believe that ABMs worked effectively, might be persuaded of this belief. MIRVs by themselves pose no such danger, since no political leader would believe that a first strike would destroy all of the enemy's strategic offensive capability; certainly it could not destroy his sea-based missiles. From this perspective, the most important purpose of a strategic arms limitation agreement would be to ban the deployment of ballistic missiles on both sides.

The CHAIRMAN introduced Professor Leon Lipson, Yale Law School, who acted as interrogator for the panel.

Commenting first on Professor Bunn's stimulating account of the effort to ban chemical and bacteriological weapons, Professor LIPSON sought to make more explicit what could be inferred from the speech. Was the legal and forensic ingenuity of the United States in construing prohibitions as narrowly as possible a good thing, or should the United States follow a "self-denying" practice of refraining from even some legally defensible activities?

Professor BUNN agreed that the United States might be better off if it renounced further use of tear gas and chemical defoliants in war. But that was not in the cards at the moment. Our Government would simply not agree. As a fall-back position, he had proposed that the United States agree to third-party settlement of the controversy over whether the Geneva Protocol banned tear gas and herbicides in war. The result would be in the interests of all nations—a uniform interpretation of a very important treaty.

Regarding the recommendation that, rather than resorting to reservations to the Geneva Protocol, the United States should agree to go to the International Court for an advisory opinion, Professor LIPSON asked whether the speaker had in mind the fact that occasionally internal strains could be reduced by resort to an outside authority.

In agreeing, Professor BUNN also pointed out that this procedure would give more time and that, hopefully, the Viet-Nam war would be reduced in intensity by the end of that time.

Professor LIPSON referred to the charges that the United States was over-

free in the use of chemical and biological weapons where non-Caucasian populations were involved because of (1) less fear of retaliation and (2) an inadequate feeling of identity with the "target" population.

Professor BUNN did not feel that this was a factor in the U. S. readiness to use such weapons. When tear gas was first used in Viet-Nam, stocks were readily available and the troops had been trained in their use. One day, a captain, confronted with caves that contained both civilians and enemy soldiers and not wanting to use flame-throwers, napalm or high explosives, resorted to tear gas—and it worked. There had been no prior instructions that U. S. forces should begin using tear gas offensively, but gas grenades and masks had been issued to our troops. Professor BUNN believed that this was how it all started; only later was gas used for the purpose of flushing out the enemy so that he could be killed or wounded with bombs or bullets. As for the relation to non-Caucasian populations, he pointed out that herbicides had first been used by the South Vietnamese to destroy rice crops of the Viet Cong.

Professor LIPSON commented that the use of gas and defoliants in Viet-Nam appeared to be an example of a technological capability leading to a legal justification.

Turning to Mr. Van Doren's very useful guide through the complex progress of the Non-Proliferation Treaty and the United Nations' rôle in it, Professor LIPSON inquired whether the speaker would care to speculate as to why it had worked, whether it had worked as well as it might have, and whether the process of demarcation of issues might have worked a little differently with a stronger, more comprehensive treaty as the result.

Mr. VAN DOREN referred to the essential element of timing—when it was that things began to work. In 1961 the United Nations had given unanimous support for a non-proliferation agreement, but serious negotiations did not begin until 1964–1965. The early discussions set the stage, but the necessary condition for progress was recognition by the two super-Powers of their mutual interest in an agreement. Until they were prepared to push, nothing much happened. Moreover, between 1961 and 1963, the Test Ban Treaty occupied the center of the stage and that was all the traffic would bear at the time. As to whether more could have been accomplished, a more comprehensive treaty would have required more specific security assurances. The United States tried to explore every avenue. A great number of interests were involved: the United States, the Soviet Union, NATO, EURATOM and other non-nuclear states which considered that the treaty discriminated against them. Mr. VAN DOREN did not believe that a better treaty could have been concluded.

Chairman FISHER pointed out that, so long as the United States insisted that it had to hold open the nuclear option exemplified by the MLF, there was little possibility for serious negotiations. The United States had a non-negotiable position even within the U. S. Government. The Pastore resolution, adopted by the Senate in 1966, introduced a note of reality and got the negotiations off to a good start. Once it was settled that the verification system would not apply to the nuclear Powers, the Soviet Union

became an enthusiast for effective verification without loopholes. The United States could have had an ironclad agreement with the Soviet Union regarding verification, but this would not have been acceptable to EURATOM. A tighter control system could not have been sold to EURATOM and a looser one could not have been sold to the Soviet Union.

Professor LIPSON remarked on the striking modesty of Mr. Halperin's views on the likely outcome of SALT. The talks were not concerned with general and complete disarmament or partial destruction of stocks and dismantling of weapons systems. Possibly not even a freeze at present levels was involved, but merely a limit on expansion of certain sorts of weapons systems—a limitation, as it were, on the speed with which the speed-up would be speeded up. Thus, the results of SALT, as reflected in appropriations and expenditures might be invisible for quite a while.

Mr. HALPERIN did not consider that there was much chance of a major agreement banning strategic weapons. The most likely outcome of SALT would have little impact on either side. Indeed, SALT might be used by the United States as an excuse for doing things we might otherwise not do and thereby strengthen the positions of those who did not want a slow-down in the arms race.

With regard to the Nixon "rediscovery" of on-site inspection, Professor LIPSON asked whether on balance there was a need for this kind of verification or whether this was an example of forensic obstruction. He noted accusations that in the past the United States had raised the verification-through-inspection issue when agreement seemed to be close.

Mr. HALPERIN explained that there were a number of different views within the United States Government on a MIRV ban. Many did not want a ban; some wanted it but were prepared to concede the need for some inspection; still others wanted a ban even without inspection. The President had been subject to many pressures regarding MIRV from the Senate and the public. It was decided to include the ban in the United States proposals but to ask for inspection. It was unclear whether the United States was hoping for a "yes" or "no" answer. Some hoped the Soviets would say "no" and then the United States could say "Well, we tried." Others hoped that the Soviets would show a positive interest in a ban. The United States position was an uneasy compromise within the bureaucracy and it was hard to predict how it would go. It depended upon the Soviet response.

Professor BUNN inquired what inspection of a MIRV ban, in contrast to a ban on testing, would involve. Would it be necessary to unscrew the warhead cover and count the warheads, and would the United States agree to this?

Mr. HALPERIN made it clear that he was talking about a ban on MIRV testing with possibly some kind of agreement on inspection. He drew attention to the proposals put forward at the last meeting of the American Assembly. The suggestion that all missile-testing take place in designated areas and at specified times might be acceptable to the Soviet Union. The right to make surprise visits to areas where the Soviet Union had tested

had also been proposed, as well as surprise visits to air defense sites to see whether a MIRV ban had resulted in their upgrading for missile defense.

In response to a question by Professor Lipson concerning what lessons, if any, the experience with the Test Ban Treaty had for SALT, Mr. HALPERIN expressed the view that there was a conspiracy to deny violations of the Test Ban Treaty by the AEC and ACDA and their Soviet counterparts. The AEC wanted to continue our underground testing, and it would be more difficult to do so if the Soviet Union were pressed concerning its violations. ACDA has not pressed the issue of Soviet violations and this same attitude has been apparent on the part of the Soviet Union. Even if Soviet violations of an agreement arising from SALT were detected, there would be a conspiracy to cover them up. The U. S. military would be playing around on the fringes of the agreement, and on the political side the United States would not want to rock the boat unless Soviet violations were gross, obvious and important.

Professor LIPSON commented that there appeared to be an attitude of "benign neglect."

As to violations of the Test Ban Treaty, Chairman FISHER stated that there had been no security loss to the United States from what the Soviet Union was doing and the same was true with respect to what the United States was doing, often over ADCA's opposition, as in the Plowshare program. The treaty as a whole, and the violations of it, had not resulted in a margin for either side.

Mr. VAN DOREN warned that one should not over-generalize from the experience with the Test Ban Treaty, for in this case the verification techniques were very good. Other disarmament measures would not be so easy to verify.

Chairman FISHER observed that the Test Ban Treaty had been carefully drafted. It prohibited testing which caused "radioactive debris to be present outside the territory" of the testing state. The treaty did not attempt to define how much "debris" had to be "present" but it clearly meant more than one atom. In a sense, any nuclear explosion violated the treaty and one had to apply the rule of reason. In Edward Teller's view, the treaty was not violated if atmospheric radioactivity was not increased to a point where people were killed. This interpretation relied on a health rather than an arms control standard. Chairman FISHER commented that the United States probably could verify underground nuclear tests down to a very low level. Had it not been for the internal haggling over the misbegotten Plowshare program, the United States could have negotiated a ban on underground testing down to the threshold of detectability. This was technically feasible, would not have adversely affected U. S. security, and would have constituted an advance in the area of arms control.

The CHAIRMAN then opened up the discussion for questions and comments from the floor.

Mr. BHEK PATI SINHA drew attention to recent estimates of \$200 million for military expenditures in 1969 (\$108 million for the NATO coun-



tries, \$63 million for the Warsaw Pact countries, and \$29 million for others). The two major power blocs accounted for about 85% of military expenditures and the United States and the Soviet Union had capacities equal to several times "overkill." Wars seemed less likely between the super-Powers than between smaller countries, India and Pakistan being one example. Nevertheless, although the less powerful countries seemed more war-prone, there had not been much movement toward their disarmament; indeed, the subject was generally approached in terms of economics rather than in a peacekeeping context.

Chairman FISHER noted that some proposals had been put forward for control of conventional armaments.

Mr. HALPERIN reiterated the point that SALT would not save money, although it might prevent the spending of more money.

Mr. S. C. YUTER raised the question of the effect on SALT of Soviet fears of Chinese nuclear blackmail. Would not the Soviet Union need to maintain an open-ended position on ABM's and would not the United States then have to be equally open-ended with respect to MIRV's?

Mr. HALPERIN pointed out that one look at the map clearly showed how much harder an anti-Chinese ABM system was for the Soviet Union than for the United States. The directions from which the Chinese could fire were numerous; they were so close that airplanes could be used for delivery, or simply people marching across borders. The Soviet Union could not hope to have an effective damage-denial system against the Chinese, and there were no signs that the Soviets were building one. They had the option of a pre-emptive strike or living with Chinese capabilities while relying on Soviet retaliatory capacities for deterrence. Soviet development of an anti-Chinese ABM would not be to the disadvantage of the United States. On the other hand, the Senate was opposed to a U. S. anti-Chinese ABM. The reasonable hope was that both sides would be interested in stopping where they are now.

Professor QUINCY WRIGHT asked what had happened to the McCloy-Zorin agreement of 1961 on general and complete disarmament. This had been a package deal covering not only agreements on armaments but on such matters as a U.N. Force and peaceful settlement of disputes. Have we forgotten about it?

Chairman FISHER explained that the agreement also provided for "partial" measures. Since 1963, after the two plans on general and complete disarmament had been presented, emphasis had shifted to the partial measures aspects of the McCloy-Zorin agreement, beginning with talks on the test ban, a nuclear freeze, etc. This approach was more realistic. In view of the Soviet attitude toward peacekeeping and inspection, one could not discuss general and complete disarmament, and yet nothing was being done to stop the build-up of nuclear arms. In general, the United States was perhaps too slow in getting around to partial measures such as the non-proliferation agreement.

Mr. BENJAMIN M. BECKER stated a number of assumptions: (1) both the Soviet Union and the United States are deeply concerned over nuclear war and its devastation and the billions being spent on nuclear weapons;

(2) both are beset by internal economic problems, with the Soviet Union having a special concern over China; and (3) both have a credible deterrent. Assuming further that the two super-Powers fail to agree on meaningful arms control and disarmament measures, he asked what the United States could do voluntarily, without agreement, to break the bottleneck of distrust and thus invite reciprocal responses from the Soviet Union.

In Mr. HALPERIN's view, the problem was not one of "trust." Up until now, the Soviet Union had been much the weaker of the super-Powers, while the United States had stressed the need for "superiority" in order to deal with Soviet aggression and U. S. defense of the *status quo*. Under these circumstances, the Soviet Union could not agree to freeze U. S. superiority. The U. S. emphasis had shifted from "superiority" to "sufficiency" and the Soviet position was to deny superiority to the other side. As the capabilities of the two Powers became more and more equal in size, for the first time agreement seemed possible. There were, however, powerful and important groups in both countries that did not want agreement. The problem was not mutual distrust between the two governments but the balance of forces within each of them between those who did and those who did not want agreement. The United States, in his opinion, could stop ABM and MIRV progress with zero cost to U. S. security and this would strengthen the hands of those in the Soviet Union who wanted agreement.

He concluded that agreements were not based on "trust" but on a capacity to monitor them. They were not based on the assumption that the other side was "peaceful" but rather that they were "sensible."

Chairman FISHER agreed, although he wondered how "sensible" it was for the United States to announce in April, just as the Vienna SALT negotiations were beginning, that it intended to deploy the MIRVs, a whole new weapons system, in June.

Professor KWANG LIM KOH referred to the Chinese nuclear explosions in the last few years. He asked how China could be brought into a disarmament conference and also raised the question of Chinese influence on U. S. policies on such matters as Japan and Okinawa.

Mr. HALPERIN saw no prospects for serious agreement with the Chinese on nuclear weapons (while not ruling out the possibilities with respect to biological weapons). The Chinese were too weak to agree to any freeze. He did not believe that Chinese military strength played a major rôle in U. S. policy decisions in the areas mentioned. The decision to return Okinawa had nothing to do with Chinese capabilities. There had been a decline in concern over the Chinese threat as the United States came to understand that the Chinese were not lunatics but quite cautious and concerned with internal developments.

With regard to Mr. Van Doren's Chart A, Mr. FREDERIC SMEDLEY questioned the listing of outer space as an environment free of mass destructive weapons. Granted the Outer Space Treaty was vaguely drawn, would not the exploding of ABM's in outer space constitute a violation of the treaty?

Mr. HALPERIN commented that the prohibitions on nuclear weapons

referred to the peacetime activities of the nuclear Powers; they were not related to the firing of nuclear weapons "in anger."

Mr. VAN DOREN explained that the Outer Space Treaty was not concerned with testing but with the stationing of nuclear weapons in outer space and placing them in orbit. The ABM's would not be placed in orbit. The aim of the treaty was to prevent use of one environment for nuclear weapons. It was not designed to curb the present strategic arms race. This would have been a much more difficult task and no attempt of this kind was made in the Outer Space Treaty.

Mr. JOHN R. WILLIAMS asked whether it was not in the interest of the United States, and humanity in general, to encourage the use of tear gas in armed hostilities, since this represented a lower level of force than a .22 caliber rifle. Why was the use of this device in Viet-Nam, or in similar situations, a bad thing? Moreover, it would seem in the interest of those who would uphold the rule of law to be able to use defoliants which caused no permanent damage in order to deal with aggression through infiltration.

Professor BUNN agreed that he would rather be hit by tear gas than a .22 bullet. The problem was that we were not starting with a clean slate in choosing what to ban. If one could get agreement to ban napalm, bullets, and so forth, tear gas would be last on the list (although it has not turned out to be as harmless as previously thought). But, to prevent violations of the Geneva Protocol worse than the use of tear gas, it too should probably be banned. If its use were permitted, countries would likely acquire devices for using it, experience with it, masks to defend against it, etc. Then it would be very easy to escalate from tear gas to much worse gases. Moreover, it was harder to police a rule permitting some gases and not others. Ease of administration would result from a ban on all gases.

Commenting on Mr. Halperin's earlier remarks about the use of nuclear weapons in war, Professor WRIGHT pointed out that the Japanese Supreme Court had held that the use of atomic bombs against cities was a violation of international law. The Institute of International Law at its last meeting in Edinburgh concluded that the use of any weapons that could not be employed against military targets without extensive destruction of civilians was still illegal under the laws of war.

Mr. HALPERIN responded that if the use of nuclear weapons was not a violation of the laws of war, it certainly ought to be. But this was not the dominant view in the United States. Any use of force that was in accordance with the U.N. Charter, including nuclear weapons, was not deemed to be illegal. There might be legal, political and moral restraints on the use of nuclear weapons, but it was not generally accepted that their use was against the law.

In reply to a question from Chairman FISHER, Professor WRIGHT stated that in his view the Luftwaffe raid on Coventry was a violation of the laws of war, even though not treated as such at Nuremberg. He pointed out that the firing by submarines on merchant vessels had also been held to be contrary to the rules of war. The German admiral had been in-

dicted for this at Nuremberg, but the Court had not upheld this count because Admiral Nimitz had done the same thing in the Pacific. It was not clear whether the Court had based its views on the ground of retaliation or had considered that this rule of law had become obsolete. In his view, both actions had been against the laws of war.

Mr. YUTER described some correspondence he had had with a Soviet lawyer who took the position that the use of nuclear weapons was illegal but still insisted on the need for the Soviet-backed convention outlawing their use. When the lawyer had referred to the Geneva Protocol and the fact that gas was not used during World War II, Mr. YUTER had questioned whether Hitler was observing the Protocol or was merely aware that the Red Army was prepared to retaliate.

Chairman FISHER commented on the Soviet position that "nuclear weapons are illegal under general international law, but let's have a convention anyhow." He pointed out that the Soviet Union agreed that neither the Nuclear Proliferation Treaty nor the Test Ban Treaty was applicable in time of war. As for the Outer Space Treaty, it was true that the treaty did not attempt to define how far up outer space begins. But the treaty carried its own definitions based on the physical limitations imposed by science. To put anything in orbit required a powerful force. How high you had to be and how fast you had to go in order not to come down depended upon the laws of gravity. FOBS (fractional orbiting bombs system) was not considered a violation of the Outer Space Treaty, since the devices were not in orbit. The same would be true with respect to testing a missile that did not go into orbit.

Replying to a question from Professor Koh, Mr. HALPERIN observed that, paradoxically, a comprehensive freeze on strategic weapons was easier than a partial one. It was easier to define and easier to verify if the prohibition was all-inclusive. It was simplest to stop everything when both sides were approximately equal.

Mr. SMEDLEY brought up the Johnson Island experiment and again questioned whether the Outer Space Treaty permitted the conclusion that outer space was nuclear free.

Chairman FISHER pointed out that the experiment could not be repeated under the Test Ban Treaty.

Mr. VAN DOREN reiterated the point that the Outer Space Treaty was concerned with placing nuclear weapons in orbit. There was no intention to carry out nuclear explosions in outer space, an activity that was prohibited under the Test Ban Treaty.

Returning to the issue of the laws of war, Professor WRIGHT observed that the prevention of war was, of course, much more important than the observance of the laws of war. The actions at Nuremberg regarding crimes against peace were much more significant than those related to the rules of war. He pointed out that the Hague Convention of 1907 prohibited the bombing of undefended places, adding to the 1899 Convention "by any means whatever" because the 1899 Declaration, which prohibited the launching of projectiles from the air, was not renewed. These

standards would justify considering Coventry and U. S. bombings of German cities as crimes against the laws of war. Leaving aside whether these actions were justifiable reprisals, Professor WRIGHT concluded that there had never been any question in his mind that Coventry was a crime under the laws of war.

The CHAIRMAN thereupon declared the session adjourned.

### **The United Nations and the Environment**

(Sponsored jointly with the American Branch, International Law Association)

The session convened at 2:15 o'clock p.m. in the Astor Gallery of the Waldorf-Astoria Hotel. Professor Richard N. Gardner of Columbia Law School presided. Before introducing the speakers Professor Gardner made the following preliminary statement:

#### **CAN THE U.N. LEAD THE ENVIRONMENTAL PARADE?**

Almost everyone is now marching under the banner of environmental defense. The United Nations ought to be marching out in front. It is not. It joined the parade very late, after the parade had passed its door. Whether and how it can exercise any real leadership in this area is a question that concerns not only environmental specialists but also students of international law and organization. The United Nations has been painfully slow in coming to grips with environmental problems. For years selected aspects of the human environment were dealt with rather ineffectively by various Specialized Agencies, with no over-all direction and no real sense of urgency.

In his address to the General Assembly in September, 1963, President Kennedy tried to change all this. He called for a global effort to defend the human environment: to "protect the forest and wild game preserves now in danger of extinction—to improve the marine harvests of food from our oceans—and prevent the contamination of air and water by industrial as well as nuclear pollution." Nobody at the United Nations responded. And when he died nine weeks later, his hopeful initiative was quietly shelved by the Johnson Administration. Not until 1968 was the defense of the human environment again brought before the General Assembly. The Swedish Delegation took its historic action in proposing the Conference now scheduled for Stockholm in 1972.

A U.N. response to the environmental challenge is long overdue. While some measures to deal with the environment can be taken by individual nations alone, there are resources that do not belong entirely to any nation—the sea, certain lakes and rivers, migratory animals—whose effective management requires international co-operation. Even management of the environment within the confines of a single nation may benefit from the sharing of national experience. Moreover, we are finally beginning to

recognize that how a nation deals with its national environment is no longer its own and nobody else's business. We are beginning to comprehend the unity of the world's ecological system, which means that all nations may be affected by how any one of them treats its air, water and land. We are gradually awakening to the realization that all mankind depends on the same scarce and relatively shrinking resource pool, and therefore has an interest in the wise husbanding of resources wherever they may be located. And business firms around the world are beginning to see that they cannot accept the additional costs of anti-pollution measures unless their overseas competitors do the same.

For all these reasons, the international community will be increasingly involved in environmental issues, even those that have hitherto been regarded as "domestic." Indeed, the most powerful impetus to world order may no longer be the threat of nuclear war, but rather the urgent necessity of new transnational measures to protect the global environment.

What exactly can the U.N. system do about environmental problems? This is what our distinguished panel of experts is going to tell us today. To help begin our discussion, let me make a few suggestions:

To begin with, the United Nations could undertake a massive program to educate the world's people, particularly political leaders, on the problems of the environment; could sponsor joint research efforts and studies; and could finance the training of specialists to handle different environmental problems. It could organize a world-wide observation network, using observation satellites and other new technology, to monitor the world's environment on a continuing basis, and it could operate a service for the evaluation and dissemination of this information for all nations. It could encourage the negotiation of international agreements providing for firm anti-pollution and other environmental commitments so that nations and industries accepting their environmental responsibilities suffer no competitive disadvantage in international trade. It could insure that multilateral aid programs are carried forward with due regard for their environmental implications, and could encourage the application of environmental safeguards in bilateral aid. (Down-stream erosion from the Aswan Dam, we now discover, may wash away as much productive farm land as is opened by the new irrigation systems around Lake Nasser.)

Finally, it could establish a U.N. Program for the World Heritage, including scenic, historic and natural resources now in danger of destruction, whose survival is a matter of concern to all mankind. Obviously, each nation should be free to decide whether or not to nominate a property within its territory for inclusion in the Program. At the same time, the community of nations should be free to decide whether or not to accept it. Countries whose resources were included in the Program would gain the advantage of international advice and financial aid in their development with consequent benefits to their economies as a whole. And the world community would be in a position to safeguard unique and irreplaceable resources—Venice, Angkor Vat, some of the great wildlife reserves of Africa—in which all mankind has a common interest.

If the United Nations is to act effectively on environmental problems, a central group of distinguished scientists should be established under the General Assembly and the Economic and Social Council to evaluate and help co-ordinate the work of the different U.N. agencies active in this area. The historic pattern of functional specialization contains the danger that ecological interrelationships may not be adequately considered. For example, FAO may vote, as it recently did, to continue use of DDT; but this question needs to be looked at by a group whose thinking is not mainly centered on agricultural productivity. An "overview" committee of experts could take a broader view in evaluating the implications for the environment of new as well as existing scientific discoveries.

If the United Nations is to act effectively on environmental problems, the General Assembly and ECOSOC, acting on the advice of a new environmental committee, will need to have real power to direct the work of the Specialized Agencies—a power that does not exist today. In environment as well as in development, the major U.N. contributors are likely to grow impatient with the historic organizational pattern in which closely related questions are dealt with in piecemeal fashion by competitive and often hostile U.N. bureaucracies.

Awareness of the United Nations' shortcomings has already led some to seek a substitute means of dealing with environmental problems. Writing in the April, 1970, issue of *Foreign Affairs*, George Kennan proposes the creation of an International Environmental Agency run by the rich countries of the world. This proposal, I submit, is unrealistic and politically naive. The developed countries of the world control less than half of the world's land area. They have no authority to legislate for the territory controlled by others or for the oceans and polar regions which are beyond national jurisdiction. The notion that recommendations or decisions taken on the global environment in a "club" of developed countries would carry sufficient legitimacy to determine the actions of the rest of the world is wholly fanciful to anyone familiar with contemporary developments in international organization.

Although most of the world's pollution is now done by the advanced countries, the actions of the less developed countries can have serious effects on the global environment. As they press forward with their own plans for development, it is vital to their own and the general welfare that they not make all the same mistakes that we have made. Rich and poor countries alike, for example, must be concerned if Middle East countries permit oil pollution from drilling off their coasts or if African countries permit the destruction of their wildlife and natural resources.

Kennan is also wrong in urging that the environmental agency be run by scientists. There is no choice but to engage all nations, developed and less developed, at the political level where firm commitments to national action can be made.

I hope the United States Government will not be tempted to by-pass the United Nations on the environment in favor of smaller, more comfortable forums. It was inappropriate, in my view, for President Nixon to

make his first concrete proposal for international co-operation on the environment in NATO. As an organization of limited membership whose principal function is military defense against the Soviet Union, NATO is not well suited to be the centerpiece of our effort in this field. The global environment concerns all nations, regardless of national, ideological, or racial differences. It offers new opportunities to transcend these differences and form a global partnership in which we and the Soviet Union take a leading rôle. Some work on the environment can be usefully undertaken in regional agencies like NATO and OECD, but a universal problem needs a universal system of organizations to deal with it. The U.N. system, including its regional commissions and Specialized Agencies, is the nearest thing to a universal system we have. The Stockholm Conference provides an additional reason to make it more universal by admitting mainland China and divided states. Let us at least urge the United Nations to invite the Peking regime, the two Germanies, the two Viet-Nams, and the two Koreas to participate in the Stockholm meeting.

Now I would welcome comments by the panelists on these somewhat provocative introductory remarks.

#### REMARKS BY CHRISTIAN HERTER, JR.\*

Mr. HERTER said that he had not prepared a paper for the panel, but that he had some general remarks to make concerning the rôle of the United Nations with respect to the problems of the environment. He said he wished to concentrate on two different aspects of the U.N. rôle:

1. A United Nations conference has been scheduled for Stockholm in 1972. No one knows if the effort represented by this conference will lead anywhere. However, it is a major effort to focus on the problems of the environment.

2. The existing and on-going activities of the United Nations itself both now and in the future. How should these activities be co-ordinated? Which of these activities are worthwhile or are being performed well? What is appropriate for the United Nations to be doing or should be delegated to other organizations? What long-term initiatives are possible through the United Nations?

#### *The Stockholm Conference*

A conference is being held in Prague in May, 1970, under the U.N. Economic Commission for Europe. In fact, this conference is a preparatory Commission for the Stockholm Conference. The idea is for the developed countries to have their say before the world-wide conference in Stockholm.

\* Special Assistant to the Secretary of State for Environment.



The Stockholm Conference is scheduled to last two weeks. 100 countries plus non-governmental organizations are being invited to participate. It would be a mistake to expect from this conference a sudden solution to the environmental problems of the world. To interest the countries of the world in the problems is in itself a major accomplishment. The conference presents real opportunities, as is shown by the agenda for the conference. Mr. HERTER then listed some of the major items of that agenda:

(1) Hopefully by 1972 there will be offered to the United Nations an international environmental monitoring system. There is presently a private organization at this time which is studying the subject. This is a very complex field. One of the problems is what instrumentation should be used for such monitoring. Perhaps space satellites would be appropriate.

(2) An international air monitoring system for problems of pollution. Problems of criteria, instrumentation, standards, health effects and weather modifications are among those which must be defined properly and agreed upon. An example of the problems that can arise would be the effects on adjacent countries if one country wished to seed a hurricane.

(3) The international monitoring of water is a matter of vital concern. Marine harvests come into this category.

(4) The conservation of wildlife.

(5) Environmental education. The United Nations could develop a curriculum to be used both in developing nations and in developed countries.

(6) Problems resulting from urbanization both in the developing nations and developed nations.

(7) Population distribution and how to control it.

(8) Conservation of natural resources through recycling (agriculture, housing and land management).

(9) What has been the experience of aid-giving agencies with respect to the ecological consequences of the projects financed by them? There are many examples such as the Aswan Dam. Are there danger signals that all international financing agencies could agree to?

(10) Institutional arrangements: The United Nations itself will have to face this question and suggest what arrangements could be made and how such arrangements should be agreed upon either by bilateral or multi-lateral treaty for example.

(11) The United Nations should devise and adopt a declaration on environment which would be worldwide in scope and concept. This would be the Magna Carta for environment.

There is a genuine need for techniques of exchange of national experience on the above subjects.

There are several dangers which may manifest themselves at the Stockholm Conference. Mr. HERTER listed them as follows:

(1) There is a very real danger arising from the North-South confrontation at the United Nations. Most developing nations feel that the concern for environment is the business of the developed countries. Even further, they often feel that it is a plot to maintain them in a state of under-development. In 1963 at an international conference on science, the developed countries talked to each other while the developing nations stood aside bored. This is a danger for Stockholm. How do you relate international management of the environment with the economic development process? Must it slow down the economic process? The developing countries will not be interested in the problems of environment unless it can be shown that it is in their interest to learn to manage the environment.

(2) Can a manageable agenda be developed for a two-week conference involving more than 100 countries?

(3) The consequences of capital projects will have to be debated. Mr. HERTER cited the example of a major hydro-electric project proposed for Murchison Falls in Uganda. Conservationists are against it, but electric power is essential to the development of Uganda. The project, if not properly managed, might easily ruin the ecology and destroy much of the wildlife of the area.

#### *Present Activities of the U.N. System*

(1) How do you co-ordinate the work of the specialized agencies of the United Nations? There is some overlap and very little co-ordination. Territorial imperatives are exercised. There is much duplication. At the same time there is also advanced and excellent work being done in specialized fields by the U.N. agencies.

(2) There is the difficulty of the collection, retrieval, storage and dissemination of information. No one knows what the other agency is doing. This is true both within the United States and in the multilateral context.

(3) Co-ordination of research should be started now.

(4) The United Nations should consider establishing a panel of environment experts for technical assistance to developing countries. It is important to give the developing countries the full range of options and an expectation of the consequences that can arise from development projects being undertaken.

In conclusion, Mr. HERTER pointed to some of the limitations on the United Nations in this field. In the first place, the United Nations is not geared to deal with the sophisticated economic consequences of environmental problems. Other organizations may be better for certain technical problems. There is some debate about establishing a new agency made up of representatives of the developed nations to take over the problem of environment from the United Nations. This is contrasted with allowing or encouraging the United Nations itself to direct efforts in this sphere. Mr. HERTER concluded by saying that his approach would lie somewhere in the middle.

## TOWARD EQUILIBRIUM IN THE WORLD ORDER SYSTEM

*By Richard A. Falk \**

### I. THE WORLD ORDER SETTING

The Peace of Westphalia in 1648 brought an end to the Thirty Years' War and marked the beginning of the modern system of world order based on the interaction of sovereign states. This state system accepts, as its basis, the formal autonomy of its units. World order is the product of the interactions between national governments. Force and warfare have been the most salient of these interactions, constituting both the principal energy of change and the main instrument of order in world affairs.

World Wars I and II brought about a determined, explicit effort to moderate the war system by building up central institutions of peace and security in international affairs. But both the League of Nations and the United Nations have acted primarily as *instruments* of sovereign co-operation rather than as *substitutes* for it. The military power of states continues to reside at national levels and the driving forces in world affairs continue to be associated with intense competition for disputed territory and political influence. From 1914 to 1970 is not a long period of time in which to transform governing structures, public attitudes, and the political consciousness of elite groups. The great historical question, accentuated by the persisting danger of large-scale nuclear war, is whether the political life of mankind can be reorganized before rather than after some kind of catastrophic breakdown.

In recent years, as a result of our growing appreciation of ecological hazards, new political facts have emerged to reinforce this world-order challenge. The interplay of rising population per square mile with rising per capita patterns of gross national product and energy consumption has brought great pressure to bear upon the systems that sustain life on earth. The critical trends in population growth, resource use, environmental decay, and technological innovation suggest that the existing dangers are growing continually worse. We do not know exactly where to locate thresholds of irreversibility, but we do know that environmental quality is deteriorating and that a growing number of expert observers are viewing the near future with alarm. From an ecological perspective, the political fragmentation of mankind into separately administered states makes no sense whatsoever. The basic ecological premise posits the wholeness and

\* Princeton University. An expanded version of this paper will be published in a volume edited by Robert Socolow and John Harte of the Physics Department at Yale University. This paper also reflects an approach that is more fully developed—with supporting evidence and concrete proposals—in my book, *This Endangered Planet*, to be published early in 1971 by Random House.

interconnectedness of things.<sup>1</sup> Up until very recently, the scale of human life on the planet did not present any dangers to the system as a whole, but, more recently, technological developments, together with rapid population expansion, have removed this margin of safety and have started building up levels of pressure that threaten to disrupt the delicate balance of links in the cycle of life on earth. To moderate this pressure responses by man will be required to embrace the whole earth; there is need for central guidance of human activities in relation to natural surroundings.

Both the danger of nuclear war and the danger of ecological collapse point toward the need to evolve a more centrally managed world system in place of the state system. The urgency of the task generates pessimism, given the slowness of human attitudes and social institutions to adapt to new conditions. At the same time, the shared danger creates a basis for human unity that has never before existed in world history. It is possible to contend that the best way to maintain world peace even in the nuclear age is by systems of deterrence whereby large-scale warfare is mainly discouraged by an exchange of effective threats; such an argument, besides being coherent, is able to provide reassurance for those who now exercise power in large governments. Critics must rely on rather conjectural arguments about relative dangers, and about high costs and the immoral basis of nuclear deterrence systems that have not proved to be politically influential. In contrast, there is no credible way to achieve ecological balance in an unco-ordinated political system that allows its main actors to organize national societies for private economic benefit. The fundamental political tendency, then, arising from the ecological situation is that the selfish pursuit of national goals by sovereign states is beginning to add up to cumulative tragedy for the planet as a whole. This fact is beginning to be appreciated by advanced industrial societies, that is, by those societies most responsible for the build-up of ecological pressure whose symptoms in the form of pollution and garbage are most manifest in them. Unevenness of perception of the planetary danger is an unavoidable by-product of the different stages of industrialization that prevail in different sectors of the world: in the poor countries the primary concern is directed toward attaining levels of industrial development that have meant power and affluence for more fully developed countries. The poor countries of Asia, Africa, and Latin America associate their national salvation, in other words, with attaining as rapidly as possible these conditions of social and economic organization that are making the advanced countries now so aware of environmental policy issues. It is also the case that richer, more industrialized countries are as yet unwilling to forgo further economic growth in order to moderate ecological dangers. Indeed the largest portion of the world's annual economic growth, as measured by gross national product, continues to be concentrated in the industrialized countries. These rich countries

<sup>1</sup> On ecological perspectives, see David W. Ehrenfeld, *Biological Conservation* (New York, Holt, Rinehart, 1970); Eugene Odum, *Ecology* (New York: Holt, Rinehart, 1969); Paul Shepard and David McKinley (eds.), *The Subversive Science; Essays Toward an Ecology of Man* (Boston: Houghton, Mifflin, 1969).

are each continuing to maximize national economic prospects with little regard for environmental consequences. Such a pattern is evident in relation to the development of the supersonic transport, off-shore oil drilling, and the race for ocean minerals. The paradox of aggregation—or the tragedy of the commons—indicates that individual self-restraint will not protect the common welfare unless an over-all regime is imposed equally on each actor. Without this common regime, no individual effort can save the community and rational self-interest suggests continuing to satisfy selfish goals.<sup>2</sup> Under these circumstances the prospects for eco-management on a world scale need to be coupled with the prospects for a global welfare system that both assures minimum living standards and works toward economic equality for all people on earth. To reach such goals would require the abandonment of the war system, which is inhibited by economic inequality—the richer countries maintaining a posture of military strength partly to protect what they have against challenges from rival states.

It is evident, then, that the present system of world order is unable to cope with the challenges of the ecological age. It is also evident that inequalities of wealth and power work against efforts to dismantle the war system or to induce the less industrialized portions of the world to forgo industrialization. The ecological, security, and welfare imperatives converge on central control extending over the whole planet.<sup>3</sup> An understanding of this convergence is certainly the first step in generating a political movement capable of shifting values and actions in the direction of human survival. The process is already under way. We are living in a convulsive period of transition. We cannot yet know whether the transition to a new form of political order can take place before the earth experiences ecological collapse. We do not know either how long the process of transition will take or under what circumstances the ecological collapse is likely to occur. But we do know that we need to accelerate this process of transition both by a program of re-education and by preparing leaders and publics to interpret correctly and respond constructively to the growing signs of disaster that surround their lives. The mere depiction of disaster is likely to discourage action unless it is coupled with a program for positive action. Fear in isolation induces immobilism, not conversion and passion.

## II. THE STATE SYSTEM: PERMISSIVE EQUILIBRIUM

The state system is characterized by the presence of primitive and weak mechanisms of central guidance in human affairs and by the vesting of territorial autonomy in each national center of authority. Over the centuries principles of common use have evolved to govern activities on the oceans

<sup>2</sup> For seminal analysis of this issue, see Garrett Hardin, "The Tragedy of the Commons," 162 *Science* 1243-1248 (Dec. 13, 1968); cf. also Beryl Crowe, "The Tragedy of the Commons Revisited," 166 *ibid.* 1103-1107 (Nov. 29, 1969).

<sup>3</sup> Such central control does not necessarily entail coercive or bureaucratic structures; indeed functional modes of control may involve a lessening of governmental presence while providing over-all guidance.

and in the airspace above the oceans. The domains of land, then, are subjected to *property* notions of exclusive control, and those of oceans to *community* notions of shared use for mutual benefit; no special concern has been given to the interplay between supply and demand. In earlier decades the volume of human demands being made on the environment was small in relation to the capacity to sustain life. Automatic checks of war, famine, and disease provided control over population pressure. These automatic checks have been greatly moderated by the development of modern public health and by dramatic advances in agriculture. As a result, the world can accommodate a far larger number of people in the sense of keeping them alive, but in the course of so doing, especially in industrial societies, great pressure on the environment has been built up. In effect, our technological advances in medicine, agriculture, and industry have shifted the point of disequilibrium to higher levels of organization without obtaining any adjustments in human behavior. We have proceeded *as if* the permissive system of control could cope with this new objective situation.

Although local shortages of food, water, and land have always existed, and rivalries among social groups generated wars, the dynamics of conflict seemed to be fully consistent with the indefinite continuation of life on earth. Religiously founded expectations about the end of the world—earlier expressions of apocalyptic consciousness—were associated with the judgment of God carried out by natural disaster (a flood) and with the search for everlasting salvation in the form of liberation from death. There was no awareness at all of the finiteness of the earth as an island in space sustaining a limited quantity of life and vulnerable to ecological disruption and destruction. More concretely, the decentralized modes of organization that result from the state system are dependent for their success upon three interrelated sets of conditions which no longer pertain to a sufficient degree.

#### A. A General Condition of Excess Capacity

Any laissez-faire system of organization presupposes the absence of scarcity as a basic condition. Scarcity calls for allocation; excess capacity in a system of automatic checks is consistent with unrestricted use. One main advantage of an abundance-system is the limited need for regulation. Each actor is generally free to pursue its interests. The common good is not imperiled by this encouragement of initiative at various levels of organization: individual, corporate, national.

International society is organized as an abundance-system kept in ultimate balance by the operation of automatic checks. Regulation is limited to special situations where over-use may create "conservation" issues, as with whale hunting. Even then co-operative regimes to uphold common interests have not often worked well; self-restraint is not very reliable and governments resist procedures for collective enforcement. The species of great whale that are endangered have not been effectively protected, despite the early identification of the problem and repeated efforts to deal

with it by joint international action. The energy of economic exploitation seems far greater than the energy of community welfare on all levels of social organization.

State sovereignty as a basis of political organization presupposes competition for limited space and resources among human groups. The political realm is confined to the problems of *man-in-society*; the concerns of *man-in-nature* have been treated as meta-political and of no fundamental relevance to the way in which men live on earth.

### B. A General Condition of Local Consequence

The whole rationale of the sovereignty concept rests on the relation of specific action to limited national space. Most events most of the time are of local significance and can be regulated by local governing bodies. Political fragmentation is not important because there is no regular need to impose uniform standards. What is done in state A is of concern primarily to state A; of course, special situations arise as when A allows its industrial corporations to dispose of raw wastes upstream and the lower riparian users in B become victims of pollution. Such clear causal impacts of events in one state upon the welfare of another can also be regulated by specific agreement and through the acceptance of compromises. River regimes illustrate the capacity of the state system to evolve co-operative regimes. The treaty method—an international extension of the idea of contract—has acted as a flexible instrument of adjustment where the actions in one state have been causing damage to another.

But if the effects are more diffuse and represent the cumulative outcome of numerous separate, small instances, each of which may seem trivial, even benign, then the state system shows almost no capacity for successful response. Problems of ocean and air pollution are increasingly becoming problems of this type. Nuclear testing in the atmosphere is a spectacular example of the widening scope and lengthening duration of events located specifically (that is, at the test site) in space and time. Temperature change or gradual buildups of ocean and atmospheric pollution are the sorts of concerns that dramatize the non-localness of critical behavior. The actuality of important forms of interdependence makes it clear that global control is not likely to result from a combination of territorial sovereignty for land activity and communal use for ocean and space activity. The need for central guidance mechanisms seems clear from an ecological point of view, especially if account is taken of certain aggravating factors in international life: (1) rivalry and distrust as the basic relationship among states; (2) maximum economic growth as a positive national goal for all countries; (3) incompatible priorities for advanced industrial societies and for pre-industrial and slightly industrialized societies.

### C. A General Condition of Compatible Use

Because of excess capacity and localness of effect, different international arenas of use did not frequently overlap in negative respects, nor did differ-

ent uses of the same arena overlap in dangerous ways. Thus the use of land and river systems did not have serious impacts upon ocean use and vice versa. Similarly, the principal uses of the oceans for navigation, fishing, naval engagements, were generally, with the help of minor adjustments, mutually compatible. Certain specific use conflicts might occur, for instance, by overfishing in a particular area, but these conflicts could usually be either resolved by specific agreement or allowed to result in the temporary deterioration of a particular resource. The international law of the oceans accommodated basic needs by granting coastal states a belt of special authority over offshore waters in recognition of special security, economic, and health interests. This régime of territorial seas constituted a compromise between sovereignty and community notions of control. It worked well so long as the projection of interests was limited to a few miles and so long as other aspects of compatibility of use prevailed.

In recent years, however, these arrangements have come under increasing pressure. First of all, the technology of war has made security claims to control ocean activities far more extensive. Second, the technology of fishing and mining has made it possible for the most advanced countries to operate at great distances from their homeland and to operate more successfully than coastal states relying on more primitive techniques. As a result poorer states have claimed protective custody over vast stretches of ocean water; Chile, Ecuador and Peru, for instance, have claimed exclusive sovereign control over waters 200 miles from their shores. Third, the value of mineral resources on the continental shelf has led states to claim this wealth for their own nationals. All three of these tendencies have involved the expansion of territorial sovereignty at the expense of the community regimes of shared use.

Beyond this, however, has been the emerging evidence of incompatibility of use. The reliance on hard pesticides for agricultural development causes damage to marine ecology in a variety of ways, and may, if it continues and increases, interfere with the production of oxygen. Similarly, industrial processes, especially those associated with the production and transportation of energy, endanger the quality of life everywhere, including that in the oceans. Diffusion of lead, oil, radiation, and waste illustrates both the interconnectedness of activities associated with modern technology and the insufficiency of control mechanisms. The *Torrey Canyon* wreck and the Santa Barbara oil blow-out are typical disasters of the Ecological Age, as are the more gradual build-ups of other forms of environmental threat. Similarly, the scale and nature of ocean mining is likely to endanger aquacultural activities.

The main point is that separate sovereign states are artificial units from the point of view of environmental protection, and the control of ocean and space activity is geared to lower levels of demand and less sophisticated technologies of exploitation than now exist. The emerging situation emphasizes the need for a central guidance system that includes capabilities for monitoring, quick reaction, rationing, zoning, standard-setting, and enforcement.



### III. PROSPECTS FOR CENTRAL GUIDANCE

These distinct challenges to environmental quality call for quite distinct responses. My basic contention has been, however, that a more active system of control is needed now at the international level because the interplay between technological development and scale of human activity has been placing unprecedented and dangerous pressures on the basic life-support systems of the planet. These new conditions make the persisting forms of political management—sovereignty and communal control—unable to cope with the situation, and, as we have already discussed, automatic checks no longer provide effective limits. Sovereignty is too *competitive* in its external relations and too *exclusive* in its internal relations to provide a rational basis for managing land-based activities. Communal control is too *permissive* as a basis for governing ocean- and space-based activities; as a consequence, sovereign claims have been asserted to uphold special interests. Existing central international institutions are too weak (poor, small, limited) to provide a substitute basis for eco-management. The United Nations may generate a better awareness of environmental dangers in the years ahead, support data-gathering, monitor environmental danger-points, and crystallize world consciousness around some highly abstract goals. The organs of the United Nations lack, however, autonomous funding, policing, and authority, and operate more as a *reflection* of sovereign will than as a substitute for it. Besides, the United Nations is a consensual system when it comes to altering its function and rôle, and there is no realistic hope of persuading governments from Latin America, Africa, and Asia that an ecological crisis threatens planetary survival. These societies are mobilizing themselves to gain access to the modern world of science and industry, and tend to regard arguments against rapid industrialization with extreme suspicion, especially when they emanate from rich and powerful communities.

In these circumstances, the prospects for voluntarily evolving adequate procedures of central guidance are virtually non-existent. The first step is to gather evidence of the insufficient capabilities of the present world-order system. Possibly an awareness of the dimension of the problems and the direction of solutions will generate political processes in various parts of the world which will work out trade-offs as the basis for adjustment. We will have to deal simultaneously with poverty, war, and pollution within some altered international system. Unless these concerns are met simultaneously, there will not even be agreement on a new world-order agenda. The future of human society depends on making persuasive the negative case—that the present pattern of relations between man-in-society and between man-in-nature endangers the whole species and the entire planet—and that positive alternatives exist and can be brought into being. One way to visualize the process is to conceive of establishing a more humane set of substitutes for the *automatic* checks of war, disease, and famine. These checks were, in any event, never compatible with the dignity of man and society, and the search for substitutes has always been present in the strivings of every main culture. We need, then, a new vision

of world order based on the conditions of dynamic equilibrium between man and nature. The political expression of this dynamic equilibrium will necessarily involve some form of central guidance. We possess the technology of communication, information-dispersal, and transportation for such centralized management. Indeed the efficiency of these new technologies poses a new set of threats to human welfare that will need to be taken into account in ecological planning. As well, transnational contacts and communities are emerging rapidly among scientific groups, business executives, students, and civil servants that might serve as the initiating actors of a new world consciousness in the years ahead. Only by achieving a shared sense of the problems facing mankind will it become possible to work toward a shared solution. No set of minor adjustments within the existing international order can hope to do more than gain time for the initiation of drastic changes in the world-order system. The need for drastic change suggests the likelihood of struggle between those who operate the state system and those who support the creation of a central guidance system. Good education, as always, should pursue a strategy of subversion, weakening confidence in existing arrangements, and even converting the old *élite* to the new vision, but it seems likely that the defenders of the *status quo* will condemn and suppress those who work toward a new world system based on an ecological vision of wholeness. Indeed, it is unlikely that prospects for change will be at all serious until a counter-movement emerges, perhaps a counter-movement that identifies environmentalists as what they are, or should be, subvertors of the existing order, apostles of a new order, part of a movement to do away with the war system, the ideology of national sovereignty, and the presence of mass misery in the world.

The shape of this new order cannot now be blueprinted. It must be an expression of a collaborative process among the peoples of the world. It is certainly not a matter merely of extrapolating existing tendencies and designing a world state that draws inspiration from the nation-state form. At most, we can make the case for the inadequacy of the present system of world order and combine it with a demonstration that the technological means exist to support a new equilibrium and advance an argument for the realization of certain dominant values. The exact structures of order, processes of transition, and shifts in wealth-producing capabilities will depend on the way in which world-order re-education and interregional bargaining proceeds in various parts of the world. As well, it will depend on the ways in which ecological deterioration manifests itself in the years ahead and the responses engendered by the mounting evidence of a survival crisis. The perspectives of international lawyers can be conceived of as contingency plans for future situations of crisis in which the search for solutions will surely grow more intense.

#### COMMENTS BY ROBERT E. STEIN \*

There are several points raised by the other speakers that I would like to comment upon in a general way while trying to cover some of the other

\* Attorney-Adviser, Department of State.

activities in the international environmental area not specifically mentioned. Mr. Herter stressed the work that is being done and that is planned by the United Nations. I would like to describe the work of a regional organization which has long been involved in environmental matters. The work of regional bodies is extremely important but often neglected. To borrow from Professor Falk's analogy between the study of environment and defense posture, regional organization can provide the "proportional response" that is needed to deal with a specific environmental problem.

The organization that is most developed in this area is the International Joint Commission (I.J.C.), United States and Canada, established pursuant to the Boundary Waters Treaty of 1909. Article 4 of that treaty states in part that "It is further agreed that the waters herein defined as boundary waters and waters flowing across the boundary shall not be polluted on either side to the injury of health or property on the other." The treaty, however, contains no guidelines, no standards and no enforcement procedures for coping with violations of this article. What the I.J.C. has done, with its very small staff, and with heavy reliance on the co-operation of both governments, is to examine specific problems of air and water pollution in accordance with the terms of a "reference" which are referred to the Commission by the two governments as provided in Article IX of the treaty. The Commission is now heavily involved in a detailed examination of the pollution of the lower Great Lakes (Lakes Erie and Ontario) and the international section of the St. Lawrence River. This study includes potential pollution from oil and gas well-drilling. The Commission has examined and reported to the two governments on air pollution in the Great Lakes, pollution of the Red River and pollution of the connecting channels between Lakes Huron and Erie, and Erie and Ontario. The I.J.C. was also directly involved in another environmental venture, the recent "shutting off" or diverting of the water at Niagara Falls to enable engineers to examine the cause of the rock falls which have occurred on the American Falls side. The way the Commission operates, because of its small staff (the Canadian side has a lawyer and an engineer and a Secretary in addition to the three Commissioners, the United States only the Secretary), and because of the technical nature of the problems (a subject to which I will return shortly), is to appoint a board of technical advisers composed of Federal, State and Provincial officials from both governments who serve the Commission as experts rather than as representatives of their respective agencies. The Board reports to the Commission which usually holds public hearings on both sides of the border. The Commission then formulates its own views and transmits them to the two governments, which can accept or reject the recommendations. The Commission's record is good.

I believe that the Commission can be used as a jumping-off point for consideration of other regional organizations dealing with environmental problems. It obviously has defects, as well as good points. I would note that the 1966 report of the International Law Association Committee on International Uses of Rivers relied heavily on the work of the International Joint Commission in its chapter dealing with pollution.

I would like to return to the relationship between the study of arms control or defense posture and the environment. I think that there are several examples of why this analogy is a good one. Some of these have been mentioned. Of great importance is the relationship of technology to the solution of environmental problems, since political solutions must be consistent with technical realities. However, policy should guide rather than be guided by technical progress. The only example of an international adjudication dealing directly with a pollution problem is the *Trail Smelter Case*<sup>1</sup> in which fumes from a smelter in British Columbia crossed into the State of Washington causing damage there. It was very apparent that the tribunal relied heavily on technical experts in reaching its judgment. This process will continue and lawyers and policy-makers must work closely with their technical counterparts in the environmental area. Professor Falk noted that the concept of deterrence could not work in the environmental area, thus indicating that there may be a basic incompatibility between development and protection of the environment. I would disagree to the extent that technology is improving. We can factor into a development program the most advanced pollution control devices which would make it possible to provide development without insulting the environment in an irreparable way.

Finally, in discussing institutions as many have in this discussion, more attention, I believe, should be paid to such questions as what it is that the institution is expected to do: provide information exchange or gathering; be a vehicle for technological exchange; or act as a regulatory body. If the latter, how should this be done, through enforcement by the international institution or by member governments? Should the institution set its own standards and if so, should they be absolute standards or minimum standards? Lastly, who should pay for the cost of pollution? In addition to the usual sources, such as government and industries, I would like to suggest international organizations, such as the World Bank, which has "reconstruction" as well as "development" among its functions.

## THE U.N. AND THE ENVIRONMENT—A COMMENT

*By Timothy B. Atkeson \**

If you want to focus the problems and possibilities involved in United Nations activity related to environmental issues, it is worth taking a quick look at the pluses and minuses as they now stand for the 1972 U.N. Conference on the Environment in Stockholm. Among the minuses you might include the following:

- a. Perhaps two thirds of the Members of the United Nations, mostly less developed countries, do not yet see protection of the environment as a priority issue or one likely to lead to benefits to them.

<sup>1</sup> 3 Int. Arb. Awards 1905; 33 A.J.I.L. 182 (1939).

\* General Counsel, Council on Environmental Quality. The views expressed are those of the author and do not necessarily reflect those of the Council.

b. Few of the U.N. Members have yet had much actual experience with national, bilateral or multilateral environment protection programs.

c. The United Nations has limited staff and budget capabilities in this area and the U.N. Specialized agencies are as yet anything but specialized when it comes to their rôles vis-à-vis environmental issues.

d. There is as yet only very general agreement on agenda and the secretariat to work out preparations for the conference has yet to be assembled.

Given these minuses, what can be hoped for?

First, I think it should be possible between now and 1972 to identify one or more meaningful and doable acts of international co-operation related to environment protection and rational use of resources. Among the possibilities I would include controls and monitoring of pollution in the atmosphere or seas and further agreement on rules relating to use of resources in the seas.

Second, I think that the Stockholm Conference should be viewed as an important milepost in educating both ourselves and the world community in looking at environment protection and resources conservation as rapidly growing international problems. At the same time we should pace ourselves. Management of the environment as a problem is going to be around for a long time and we can afford to let other spokesmen than ourselves characterize the urgency of the situation. Our own rapidly growing national programs should enable us to provide useful technical advice, but there is much to be gained from our encouraging the initiatives of others such as the Swedes who invited the conference. We should also have in mind a scenario running well past the 1972 Conference so that we do not hypnotize ourselves into a short-range perspective.

Third, it is a continued possibility that the environment as an issue can bring us, despite all the fallibility of men and nations, to some important new perspectives. If we are convinced we live on a spaceship Earth which is a closed system with problems akin to those of Apollo 13, we might just see the East-West and North-South divisions differently. If this ever happens, the United Nations, or some evolution thereof, may become far more important to us all.

We will surely not reach this stage by Stockholm in 1972 but we should put our minds now to measuring baselines in the world environment that will tell us and the world where we are and where we are tending. If we can get the facts accurately, comprehensively and in a meaningful manner in periodic World Environment Reports which the United Nations might sponsor, mankind may just possibly respond, as the crew of Apollo 13 did, in a rational, courageous and innovative manner.

## THE U.N. AND THE ENVIRONMENT

*By Donald McRae \**

I would like to comment on some of the organizational problems within the U.N. system to which the question of the human environment gives

\* Columbia University Law School.

rise. Discussion of environmental problems tends to focus on the questions of pollution and population control. These are the areas in which at present most impact is felt. But these aspects do not seem to pose too many difficulties of an organizational or institutional nature. Certainly there is a need to determine which institutions should deal with, say, the pollution of the oceans, and there is a need for the dissemination of more scientific knowledge about the effects of certain pollutants and a need to formulate standards and influence governments to adopt them. But these types of problems, that is, getting information, evaluating it and developing standards, are no different from problems which arise when any subject is dealt with at the international level.

The greatest challenge for the U.N. system comes from the broader implications of the environment question, that is the long-term preservation of the earth and the maintenance and improvement of the quality of life. For under this heading we are concerned with, potentially, all human activities viewed from the perspective of the conservation and rational use of the biosphere. The concern is no longer simply for the rational use of natural resources, but with the preservation of all that contributes to the quality of human existence and the elimination, or at least the depreciation, of all that is detrimental to human existence. Part of the problem is, of course, to determine what contributes to the quality of life and what is detrimental to it. From the organizational point of view, however, the greatest problem arises from the fact that the work of all institutions must come under scrutiny if the environment is to be considered comprehensively.

Three important principles seem to emerge from this approach. First, environmental problems cannot be dealt with internationally by a small group of nations. In an article in a recent number of *Foreign Affairs* Mr. George Kennan has argued that an environmental agency ought to be established by the "leading industrial and maritime nations." This might be the way to solve the more immediate concerns of ocean pollution, or air pollution in the cities, but as an approach to the problem generally it is open to objection. To advocate the creation of an agency by a limited number of states indicates an acceptance of the view that the preservation of the environment is a matter affecting only the industrial and developed states. This, it seems, is patently wrong. Certainly at the moment the consequences of lack of environmental care are being manifested in the industrial states, but the problems are in substance the same for all states. Clean water, clean air and less noise are of interest to both the developed and the less developed countries. Indeed concern for the environmental consequences of human activities ought to be an important part of development considerations.

This leads to the second principle. In order to successfully control harmful consequences to the environment agreed standards must be built into development programs carried out under the United Nations' auspices. Such standards might be difficult to establish because, when environmental standards and development needs are mixed, the question of priorities arises; the alternatives are not always easy where the cost of ceasing a

harmful activity is widespread disease or starvation. The point is that the United Nations must establish means by which development programs are tested and evaluated in environmental terms without endangering the over-all flow of development assistance. This will certainly be a condition of the acceptance by a number of nations of United Nations activity in the environmental field.

This in turn leads to the third issue. What is the best organizational approach for the United Nations to take to ensure that the activities of its institutions contribute to the enhancement of, rather than the detracting from, man's environment? One alternative is to create a new agency, but this is a step which, while easy to suggest, may well compound existing difficulties. Two questions must be asked. Could a new agency replace adequately the work of existing agencies or would it merely duplicate that work; and, secondly, do environmental problems readily fit within a separate category so that they can be dealt with outside the framework of the United Nations' regular activities? My answer to the first question is that it is unlikely that existing agencies will be prepared to abdicate a large portion of their present functions in favor of a new institution; and to the second question I would say that all of the activities of U.N. bodies and agencies can be viewed from an environmental perspective; each is capable of changing or affecting man's surroundings. Thus the creation of a new agency might serve to isolate concern for the environment from the very activities which give rise to that concern.

The organizational task which human environment problems pose is a supervisory one, keeping track of all U.N. activities and evaluating them in accordance with environmental standards. In other words the United Nations is faced with its traditional problem of co-ordinating the activities of all its institutions and agencies, but this co-ordination can now be centralized around a unifying principle—the preservation of the human environment.

Moreover, there is a clear link between this aspect of the environmental problem and other recent developments within the U.N. system. I refer principally to the Jackson Capacity Study of the U.N. Development System and the current suggestions for a reappraisal of the rôle of ECOSOC. Some of these proposals indicate means by which environmental considerations could enter into the economic and social activities of the United Nations. The Jackson Study, for example, proposes the formation of a Policy Co-Ordination Committee, which would be a reformed ACC, and which would deal with both the administrative aspects of inter-agency relationships and general economic and social questions. Such a committee could easily add an environmental component to its evaluation and co-ordination of agency programs. Equally a complete restructuring of ECOSOC could take place under which the Council's co-ordinating functions would be more clearly defined and an express authority given to prevent U.N. institutions from undertaking activities which would produce harmful environmental consequences.

Although there are a number of ways in which the organizational difficul-

ties arising out of the environment question could be approached, it is clear that in their present forms the economic and social activities of the United Nations are insufficiently co-ordinated to allow an effective comprehensive appraisal of their effects on the environment. Thus the third principle arising out of the rôle of the United Nations in the environment is that the problem must be linked to that of institutional reform of the U.N. system. Ultimately the success of the United Nations in the environmental field will depend rather on its own ability to restructure and reform its institutions than on the willingness of Member States to accept environmental standards.

Chairman GARDNER thanked the speakers for their remarks and then called on the members of the audience to make comments and ask questions based on the remarks of the panel members.

Professor FALK said that the logic of the Westphalian system is that each country maximizes its own self-interest. This is a laissez-faire philosophy. This logic requires a common set of standards uniformly applied. This logic is applied in the security and deterrence fields. There is an internally consistent element in deterrence, but not in environment. There is no reason to suppose that the Westphalian system can evolve the kinds of structures necessary to deal with the threat posed by the environment crisis.

Chairman GARDNER commented that one problem is how to get the developing nations interested in the environment problem so as to institute an effective international program. For this purpose it is important that the developed nations demonstrate by word and deed that environment is not being pushed as a substitute for economic aid. It must be justified as an over-all program to improve life on earth, one which will involve a transfer of modern technology from North to South. Presently, the U. S. posture on economic development looks like it is backing away (while other developing countries are improving). This causes the developing countries to resist U. S. leadership in the environment field. The United States must recapture the lead in the field of transferring aid in order to be credible with the developing nations. Mr. GARDNER is not pessimistic about the attitude of the developing nations. In 1962, when technical assistance in the field of birth control was first recommended in the United Nations, the vote was 34 in favor, 34 against and 34 abstaining. By 1966 such a program was adopted. The developing nations, originally negative, had changed their position. The lesson in this is that if the U. S. position is strong, then the developing nations can be convinced.

Professor WOLFGANG FRIEDMANN asked how do we go about achieving environmental control? This is linked with the issue of unilateral moves or multilateral moves. Are unilateral moves a good way to raise international standards in this or any field of international law? Professor FRIEDMANN believed that they are not. We must not delude ourselves as to what is happening currently. There is presently an "ocean bottom grab" doctrine being put forth. In addition, we have recently witnessed the unilateral stance taken by Canada. There is a favorable aspect to the



Canadian move, notably that it may have been a genuine move for conservation, unlike the usual ocean bottom grabs. There was undoubtedly a danger of pollution, but the Canadian move also contained an element of destruction of the freedom of the seas. The Act contains powers of determining shipping lanes and exclusive fishing rights, which presage full sovereignty over the 100-mile zone. This is another example of the continuing trend since World War II and the extension of the Westphalian system to which Professor Falk referred. It has been argued that the Canadian move is an extension of international law. This is true only in the sense that it may lead to further multilateral restrictions of international freedoms by custom or convention. The usual result is national claims and counterclaims among which international interests tend to get lost.

Do we have a choice in proceeding on a multilateral level through the United Nations, a special agency or small groups of nations? Professor FRIEDMANN believed that we must proceed on all levels at once, beginning soon by special arrangements between those states with immediate and shared interests. If Canada had played its cards differently, perhaps by an ultimatum demanding a bilateral agreement and institutionalization of controls, it would have rendered a greater service to international law. There exist already the beginnings of expression of common interests in institutional form. The International Court of Justice made certain observations in the *North Sea* decision. There is an immediate and inescapable need for those states which share problems in this field to adopt multilateral approaches.

Mr. HERTER stated that by and large he agreed with Professor Friedmann. Everyone is faced with having to deal with the problems of environment. It is important to do what is possible now and hope for a change of the institutions soon. There may not be time to wait for the United Nations to reorganize itself. He cited a series of examples such as an Arctic regime and the proposed Antarctic regimes. Alluding to the suggestion contained in the recent George Kennan article, it may be important with respect to environmental pollution to work out *ad hoc* arrangements between the developed countries rather than wait for the United Nations to be able to do so. Environmental pollution is particularly the problem of the industrialized developed countries. On the other hand, the long-run conservation problems should more properly be dealt with within the United Nations. Those who have the problems should get together now and deal with them. In reality, those agencies with power will deal with them. We must not dismiss the smaller multilateral efforts that are taking place.

Ambassador EDVARD HAMBRO made several comments. He agreed that close co-ordination between the different U.N. agencies must be brought about. There is much to be done in this area. He expressed a reservation on the earlier comments criticizing the U.N. Secretariat. It is very difficult for the Secretariat to come up with serious initiatives because certain delegates are always ready to kill any initiatives. It is easier for them to do so when the initiatives are put forward by members of the Secretariat.

Ambassador HAMBRO stated that there is a tendency in the United Nations to feel that, once a resolution has been passed, the problem to which it is addressed has been solved. However, it is even more important to follow up. Ambassador HAMBRO found Mr. Falk's statement important and very useful. He agreed with the Westphalian description, but we have to deal with it as a reality. It is customary always to talk about national sovereignty. We must stop stressing that point and preach over and over again international interdependency and solidarity. This may be a platitude, but it must be repeated. Within the United Nations people say "don't frighten everybody," but we have to, and as often as we can, in order to make people think about the situation.

Another argument that is put forward is that talk about the seabed or environment problems is just an attempt to distract attention from the important fight for peace and security. This is wrong. We must do both. We wish to have a world fit to live in when we obtain peace and security. Norway and Sweden are together on the struggle to improve the environmental situation. This is not enough. It is important that the great Powers take up the fight. Ambassador HAMBRO expressed his hope that the idealism and spirit of this panel would have some influence in the United States.

Professor CARL Q. CHRISTOL expressed the view that Professor Gardner's indictment of the United Nations was too severe. Much depends upon what is meant by the term "environment." If the term includes human beings, as it should, then the United Nations has certainly sought to improve their condition through the Universal Declaration of Human Rights and the numerous Covenants and other international agreements relating to Human Rights. Moreover, the record of the United Nations is not entirely bleak concerning the physical environment. For example, the 1958 Geneva High Seas Convention in Articles 24 and 25 seeks to limit oil pollution and pollution from radioactive wastes. Also, the 1967 Outer Space Treaty in Articles 4 and 9 provides against the orbiting—and hence contamination—of nuclear weapons or any other kinds of weapons of mass destruction in the space environment as well as the requirement that those who conduct exploration in the space environment must avoid harmful contamination and adverse changes in the earth environment. Thus, in this perspective it is possible that the United Nations is doing quite well, even if not well enough.

Professor GARDNER answered that it took the United Nations too long a time to come to grips with the environment and the population problems. There has been an absence of leadership within the United Nations and no encouragement from the Secretariat. The Secretary General could have spoken on these issues long ago in his annual report.

Professor GEORGE SPILLCOTT expressed his disagreement with the criticisms of Canada expressed earlier by Professor Friedmann. The unilateral declaration by Canada was an act of abatement taken to prevent irreversible and irreparable harm until multilateral, not bilateral, agreements to stop the pollution of the Arctic can be reached.

Dr. JOSEPH CHACKO said that he had had an opportunity to write on the subject of the International Joint Commission in the 1930's. That organization sets a good example for co-operation among adjoining countries. Dr. CHACKO wondered if the treaty under which that commission operates could be enlarged to include Mexico. In this manner it might be possible to establish working arrangements in various regions of the world. A universal treaty or approach among developing nations and developed or under-developed countries seems difficult, almost impossible at the present time. It would be easier for the developed nations to set an example because they are more industrialized and, therefore, suffer from pollution. The developing nations are much less industrialized; so the pollution problem is not so very serious to them. Though the United Nations, regional co-operation should be encouraged immediately. Expenses should be apportioned according to the degree of necessity and immediacy that each country faces. Can we not start by regional co-operation between the United States, Canada and Mexico, or between the United States and Canada to begin with?

Mr. STEIN answered that there is presently a U.S.-Mexico International Boundary and Water Commission set up pursuant to the Treaty of February 3, 1944 (Treaty Series No. 994). Joint meetings with the U. S.-Canada Commission have been proposed, but so far, nothing has happened. He agreed with the suggestion that the two Commissions should meet together and exchange ideas.

Professor MYRES McDOUGAL felt that a distinction should be made between the development of international law in general and the application of international law in a particular instance. No state alone can make or reject international law unilaterally, whether by agreement or by customary law, but can apply it in particular instances.

Two theories were put forth today by the panel: the "grocery list theory" of Mr. Herter and the "survival theory" of Professor Falk. The problem with the grocery list theory is that it is a grab bag of loose ends. We need a homogeneous itemization of the problems in terms of priorities in importance, which might show that there is no great difference between the North and the South on these issues. There is a whole range of interrelated problems.

Commenting on the survival theory, Professor McDOUGAL said that the situation is conceivably as serious as Professor Falk makes it, but he would think for different reasons. We need to know more about it. The Westphalian-Charter dichotomy is too simple and not as clear as Professor Falk makes it. Breaking the problem down in an elementary distinction between national and international interests will not work. The greatest national interests a state may have are those it shares with other states. In the United Nations there is a continuous effort to clarify common interests.

With respect to the implementation of programs directed to resolve the environmental crisis, it should not be confined to unilateral effort. If, however, a state cannot obtain co-operation, it may need to invoke self-defense

and self-help. Professor McDUGAL expressed some agreement with the ideas expressed by Mr. George Kennan. It is worth while to propose special agencies, but the problem is so vast that every aspect of the U.N.'s functioning will have to be improved. There is a whole range of alternatives that could be considered, if the problems were properly formulated.

Mr. HERTER agreed that there are many problems of common interest with the developing countries which should be considered within the United Nations. He reiterated his feeling that some problems of primary interest to the developed countries cannot wait.

Mr. EDWARD McWHINNEY said that international law, in its historical development, has often been made by unilateral acts. The test is whether such acts strike a reasonable balance of the competing interests involved. Canada had tried to do this. The way of a convention had not seemed open at this time. He expressed his belief that the Canadian pollution control measures, on balance, were reasonable and that the most moderate controls available had been used. He was troubled with some procedural aspects of the Canadian move, particularly those involving the exclusion of the World Court's jurisdiction. In its substantive aspects, however, the Canadian declaration on pollution control was essentially in accordance with existing law as declared by the *Institut de Droit International* at its reunion in September, 1969. Canada felt that it had had no alternative: it was a question of either acting now or being too late.

Professor JOHN FRIED suggested one should remember also the United Nations' positive contributions. One of the great tasks and achievements of the United Nations has been to make nations *aware of problems*. This has continuously widened the concerns of the international community. As examples, he referred to the United Nations' efforts in the previously neglected fields of population statistics (which then alerted the world to the population problem) and of ecology—a word hardly known when the United Nations was founded.

A major difficulty at the United Nations has been unwittingly depicted in a recent *Punch* cartoon: queuing up to enter Noah's Ark, the big animals were slow getting aboard, so the little rabbit couple produced 15 children while awaiting their turn. The wealthy nations are mainly responsible for the environment crisis. The developed countries pollute the environment (and not only their own) and consume most of the world's raw materials that are becoming scarce.

The basic attitude toward what is desirable must be changed. "Measure and harmony," the Greek ideal, should replace the motto "The bigger the better." In this context, the defoliation in Viet-Nam cannot be ignored. Obedience to the laws of war turns out to be ecologically indispensable. He agreed with most of Professor Falk's presentation, but suggested that the ever more urgent environment problems could not be solved while disregarding the wastes and dislocations caused by the policies of balance of terror.

Professor DOUGLAS JOHNSTONE expressed his agreement with the views put forward earlier by Professor McDougal. Unilateral lawmaking is not

necessarily, invariably, less desirable than multilateral lawmaking, regardless of circumstances. Developments in international law may and should originate at all levels of human activity.

The existing danger to marine resources is not uniform. In view of the gap between the North and the South, efforts to establish institutions for environmental protection may be more desirable at the regional level. At the same time there is a universal responsibility to co-operate in efforts to introduce norms for the safeguarding of the marine environment. Moreover, each coastal state has a special interest in maintaining the quality of the marine environment within ecologically significant limits. Until global systems can be devised, there may be much to be said in favor of regional and semi-regional schemes for the protection of the marine environment, each scheme varying in kind with technological and other changes affecting the problems of environment control.

Professor SAMUEL A. BLEICHER said the reformist perspective described by Professor Falk might better be called an economic perspective. In the United States economists tell us that the gross national product would be larger with pollution controls. This can be extended to the international sphere. There is an economic interest for both developed and developing countries in pollution control. In trying to convince developing countries of the value of pollution control to economic development, we can urge a more sophisticated way of measuring growth. Certain savings, like a healthier work force, do not show up in gross national product directly when you institute pollution controls. It is not a matter of "keeping the growth rate down so that we can all survive." Such an attitude reflects the failure of our present statistical approach in measuring growth.

Professor VED NANDA agreed with Professor Falk's survival perspective. He asked the panel to address itself to the question of what agency is the most productive now in training personnel and helping to restore the ecological balance.

Miss RUTH RUSSELL, describing herself as a "survivalist," thought governments would not support effective international measures before they even face realistically their own pollution problems. The discussion had not considered the vast sums necessary for any environmental clean-up. In America, we are told, even the end of the Viet-Nam war will not make available enough resources to feed, house, and educate our people. Resources for the environment will therefore have to come out of other programs. What is to be sacrificed to pay for environment? Her own candidate would be the space program, seemingly aimed to get us to other dead planets. She asked Mr. Herter what his candidate would be, since choices must be made?

Mr. HERTER said that he could not comment on whether the space program should be sacrificed to make resources available for environmental control. The President's recommendations to Congress call for enormous expenditures in this field. Congress has forced the President to take action with respect to sewage systems. Mr. HERTER said that priorities could not be allocated without a major discussion, but that the audience should

realize that more is being done than anyone recognizes. There are many programs under way. As an example, he cited the Great Lakes, where conspicuous progress has been made within a year.

Professor ROGER FISHER said that the problem was to be operational without being conservative. Academicians like big problems. There is little work on practical proposals to improve the environment. People just agree that "the world is coming to an end." The real task for less polluted and more polluted countries is to think both operationally and radically at the same time. The grocery-list approach tends to be small in terms of what is possible. Those thinking big tend to be radical but try to deal with the whole world at once. Professor FISHER urged that the two approaches be combined. First, we should be extremely operational and then we should think radically. We should develop a case for a specific approach. Professor FISHER believed that the public is far more ready than the politicians to act radically in this area.

Mr. FRANCIS SARGUIS addressed a question to Professor Falk concerning the imminent character of the threat to environment. We have still not resolved disarmament at the nuclear level. What distinguishes the problem of environment from the one of nuclear disarmament? Referring to Professor Falk's distinction between the Westphalian concept applicable to the security field, but not to the environment field, Mr. SARGUIS asked what ramifications there might be from successful attempts to control the environment. Will a breakthrough at the environment level give us an arms-control breakthrough?

Mr. NICHOLAS A. ROBINSON made two observations. He agreed with previous commentators that Professor Falk's distinction was too strongly put. He was struck by the fact that there were no scientists participating in these proceedings, only lawyers. In dealing with environment problems one must talk in the context of specific problems and must talk to scientists. With respect to the developing nations becoming concerned with the environment, Mr. ROBINSON asked whether many persons or companies in the developed nations in fact consider the conservation of wildlife and related questions of environmental quality as an international issue. Will the United States revamp its Mekong plan? Are oil and gas interests going to revamp and retool in accordance with standards developed by an international body? How can the developing nations be expected to come along if the developed countries are still embarked on a course opposed to environmental protection?

Professor GIDON GOTTLIEB felt that it was appropriate to make a jurisprudential comment. We see the emergence of a new set of community expectations, perhaps similar to human rights in 1776 and 1789. The task of choosing between various sets of present claims is of concern to the new states. Professor Falk spoke of survival, but did not say whose survival. Some balancing is necessary. The choice between competing claims is the heart of what is at stake. It is tempting to follow Professor Fisher's advice to be both operational and convincing, in short to convince the developing nations by joining the environmental issue with economic de-

velopment. There is no better opportunity to convince new states than by blending operationally various claims and demands.

Mr. HERTER commented that the questions raised had been very good. The United States relies very heavily upon, and attaches much importance to, the conference scheduled for 1972 in Stockholm. It is important to think big, to evoke a response that will be useful. The grocery list prepared for the conference is not intended to include all the complexities of the economic aspects being considered in other bodies. The OECD, for example, has a staff and the expertise to look into more complex economic aspects of the environmental problem.

In looking at the ecological consequences of major projects in the world, there is under the Jackson Bill a requirement that every Federal agency make a full report and review of the ecological impact before giving its approval to any project, including those submitted by the U. S. Corps of Engineers. The Agency for International Development has similar internal regulations. As far as the United Nations is concerned, many organizations have a piece of the problem. There are many contributions, but no one organization is pulling it all together.

Professor FALK said that, at the present stage of awareness about problems of environmental quality at the global level, the most important task is to pose conceptual alternatives in terms of organizational principles dominant throughout the history of international (as opposed to national) society. This makes clearer the contour of the problem which is otherwise obscure. There could exist a presumed compatibility between the national deterrence approach and the ecological problems, but compatibility dependent on a condition of abundance and autonomy with respect to the use of land, water, and air. These two conditions no longer exist. Hence, we must question the whole logic of the traditional system. National societies are organized to maximize economic development. On the other hand, participation in international society is based on full permissiveness. There is no allocation of priorities. International society needs a rationing system and central guidance. This was the point of Professor FALK's earlier distinction.

Professor FALK said that the point about deterrence which he had attempted to make earlier was not that nuclear arms deterrence is rational in itself, but that it is a logical continuation of what has gone on for many years. There is a contrast between *ad hoc* arrangements used in the past and the setting up of a consistent approach to deal with an international problem such as the threat of destruction of the environment.

Professor GARDNER closed by saying that, even though there exists no world federation, we should not underestimate the potential of world organizations in stimulating the world to action. We saw this in the population field. In 1962 the U.N. resolution provided an opportunity for the United States to move forward internally on a policy level. The same can be true in the environment field. In preparing for the 1972 Stockholm Conference, all Members are being asked to answer a U.N. questionnaire. The very act of responding to such a questionnaire will stimulate new think-

ing by Ministers of Foreign Affairs and their legal advisers. This is an indirect, less sensational benefit of the efforts of international organizations. Professor GARDNER concluded the session by saying that fortunately we have begun to interpret the handwriting on the wall and to cope with it.

The session thereupon adjourned.

### Practical Aspects of International Litigation

The session convened at 2:15 o'clock p.m. in the Basildon Room of the Waldorf-Astoria Hotel. Mr. Ernest A. Gross, member of the New York Bar, presided.

The CHAIRMAN stated that the main purpose of the panel discussion was to give a practitioner's view of international litigation, so as to develop a rounded presentation of the problems encountered in various types of international litigation, in particular, arbitration and judicial proceedings before the International Court of Justice. He noted that the panelists also hoped to show the extent to which the United Nations and its family of agencies provide both principles and information which are important for practitioners engaged in international litigation.

The CHAIRMAN introduced the panelists, Mr. John Carey, Mr. Howard H. Bachrach, and Professor Henry P. de Vries, and noted that each of them had had broad experience in various aspects of international litigation. He then called on Mr. Carey to outline the sources of information made available to practitioners of international litigation by the United Nations and related bodies.

### WHAT LITIGATORS SHOULD KNOW ABOUT THE UNITED NATIONS

*By John Carey \**

Nine years ago I was litigating before an arbitrator a dispute concerning the fair market value of Venezuelan crude oil in 1959. At the same time I was writing a paper on "United Nations Publications Useful to Lawyers." When I delivered the text to The Association of the Bar of the City of New York for publication in *The Record*,<sup>1</sup> it contained a paragraph telling how useful an economic study by the World Bank had proven to be in the arbitration. The book made a statement, which I had quoted with glee to the arbitrator, seeming to support my argument that discounts below "posted prices" were not as deep as my opponent claimed. Arbitration being supposedly rapid, I fully expected this one to be out of the way between the spring of 1961 and the December issue of *The Record*. But the case still dragged on after the galleys were out, so I had to delete the paragraph, lest I be accused of trying my case in the Bar Association's journal. Now at last I have a chance to say in print how glad I was to

\* Of the New York Bar. The author wishes to express his gratitude for the assistance of Mr. Donald Harkleroad of the New York Bar in the preparation of this paper.

<sup>1</sup> Vol. 16, No. 9, at 531 (1961).



have the World Bank study to quote. Without it, the result might have been even worse.

The 1961 article is a good point at which to begin on what litigators should know about the United Nations. Whether the forum is a board of arbitration, a State or Federal court, or the International Court of Justice, where redress for injured stockholders has just been denied in the *Barcelona Traction Case*, there is much United Nations material which can help the litigator. Some of it I mentioned in the 1961 paper, which was not intended for litigators only. Relating to the subject of arbitration, I noted in the paper that ten volumes had been published of the United Nations *Reports of International Arbitral Awards*.

Of interest to the criminal lawyer, I mentioned a U.N. study on *Freedom from Arbitrary Arrest, Detention and Exile*, and should have included the *International Review of Criminal Policy and the Standard Minimum Rules for the Treatment of Prisoners*. I quoted the *New York Times* of May 7, 1961, which said that "by common agreement, the United Nations is the main center of the activities of governments against the illicit drug traffic." The *Cumulative Index 1947-1959 of the National Laws and Regulations* relating to the control of narcotic drugs was referred to. I noted the work in the spring of 1961 of the U.N. Conference for the Adoption of a Single Convention on Narcotic Drugs, which Convention has since come into force. Criminal lawyers may have been jolted a month ago to read of a prosecution for alleged importation of chrome from Southern Rhodesia in violation of U.N. Security Council resolutions. The resolutions, binding legally on all U.N. Members, are worth consulting, as well as the U. S. Executive Order and underlying Federal statute.

Not just criminal court litigators but all concerned citizens will follow with interest the latest developments in the field of international narcotics control. In March the U.N. Economic and Social Council decided to ask the Secretary General to convene early in 1971 an international conference to adopt a protocol for the control of psychotropic substances such as LSD, "pep pills" and sleeping powders.<sup>2</sup>

<sup>2</sup> The 1969 report of the International Narcotics Control Board notes that: "90. From earliest times the abuse of narcotic and other dangerous drugs has periodically assumed different forms. Perhaps the most radical change of all has been the recent startling spread of misuse of cannabis and of other substances which affect the central nervous system: the stimulants, the depressants, the hallucinogens. As was indicated in the Permanent Central Board's report for 1966, this development has caused anxiety to all the international organs concerned and it has now acquired such dimensions as to give rise to public alarm in a number of countries. Resort to these substances is particularly pronounced among the younger generation. In the United States, for example, it is authoritatively estimated that several million college students have at least experimented with them.

"The rapidity with which this phenomenon has gathered force and has swept across the world has re-emphasized a lesson gained from experience in the sphere of narcotics, namely that no country can protect itself single-handed and that preventive measures can only be fully effectual if they are internationally based. It is realization of this fact which has led countries particularly affected to appeal to the United Nations and to the World Health Organization for international co-operation in meeting this new threat." U.N. Doc. E/INCB/5 at 25 (1970).

For the labor lawyer, whose work is so largely quasi-litigation, the United Nations has much to offer. My 1961 article noted the International Labor Organization's *International Survey of Legal Decisions on Labor Law*, and its bi-monthly *Legislative Series*, containing laws and regulations from many countries which might prove persuasive for comparative purposes with arbitrators, legislators, or even opposing bargainers. The ILO's *International Labour Review* should be mentioned here. The United Nations' own *Legislative Series* was shown to have included a title on immunities of international organizations under national legislation, also useful for comparative purposes.

The tax lawyer, no stranger to litigation in court or quasi-litigation in conference, should know about the United Nations' *International Tax Agreements* series, containing texts dealing with double taxation and fiscal evasion, nine volumes of which had been published in 1961. Today I should also mention to tax men the United Nations' activity in promoting double taxation agreements and tax reform generally, primarily to aid developing countries.

In my firm some of the most litigious lawyers happen to be copyright experts. They are glad to know about UNESCO's *Copyright Bulletin*, not to mention its *Register of Legal Documentation in the World*, which I mentioned in the 1961 paper, as well as another specialized agency publication, the World Health Organization's quarterly *International Digest of Health Legislation*.

I little dreamed in 1961, in citing the just-concluded thirteenth session of the U.N. Subcommittee on Prevention of Discrimination and Protection of Minorities, that I would have the privilege of participating in its eighteenth through twenty-second sessions as alternate to Ambassador C. Clyde Ferguson, Jr. These five sessions have established to my satisfaction the value of litigation experience in qualifying one to present a viewpoint in an international organization. The 1969 session produced material intensely interesting to litigators, as well as to lawyers generally and to those who use lawyers. The agenda item was *Equality in the Administration of Justice*, on which a lengthy report was produced by a Special Rapporteur, Chief Justice Mohammed Abu Rannat of the Sudan, with Secretariat assistance.

Mr. Abu Rannat proposed certain Principles on Equality in the Administration of Justice (U.N. Doc. E/CN.4/Sub.2/L.528). The Principles enumerated certain rights to which each person should be entitled without distinction "in the determination of any criminal charge against him or in the determination of his rights or his obligations through civil, administrative or other judicial proceedings." Among the draft principles are these which I particularly look forward to discussing in the light of our own American experience:

National laws concerning legal aid shall develop such aid to the utmost extent consistent with the economic resources of the country concerned, with a view to the ultimate elimination of all expenses arising from the enforcement of a reasonable legal claim or defence in

any judicial proceedings, whether such expenses arise from court charges, lawyers' fees, fees of expert witnesses, travelling expenses of witnesses or otherwise. . . .

National laws concerning provisional release from custody pending or during trial shall be so framed as to eliminate any requirement of pecuniary guarantees and shall be designed also so as to reduce detention pending or during trial to a minimum and to limit to the extent possible any discriminatory exercise of the power to grant provisional release.

Since the United Nations' 1968 International Conference on Human Rights, the organization has been making efforts to promote legal aid within nations. Some aspect of legal aid will be the subject of a U.N. seminar this summer, the first in the U.N. seminar series to be held in the United States. Many of these have related to litigation, including the 1968 seminar at London on freedom of association, in which I participated.

The prime concern for foreign investors is, of course, expropriation. A possible new litigation forum in such cases is the World Bank's Center for the Settlement of Investment Disputes. Interested lawyers should steep themselves in the lore surrounding the U.N. concept of "permanent sovereignty over natural resources." This euphemism for the right to expropriate worked its way into the two 1966 U.N. Covenants on Human Rights, to the chagrin of some, since the International Court of Justice was punished for its 1966 *South West Africa* decision by being unmentioned.

Another new agency, the U.N. Commission on International Trade Law (UNCITRAL), should be carefully watched by litigators, particularly for its work on arbitration<sup>3</sup> and on statutes of limitations for international sales of goods. In 1968 at its first session UNCITRAL decided to draw the attention of U.N. Member States to the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards. In March Nigeria became the 36th party. Last year's UNCITRAL documents included two of note on arbitration. One was a bibliography (A/CN.9/24/Add.1) listing works in Czechoslovak, Dutch, English, Finnish, French, German, Hebrew, Hungarian, Italian, Japanese, Polish, Portuguese, Russian, Serbo-Croatian, Spanish, Swedish and Turkish. So wide a range of views might be of little value on a legal subject with substantial local variation, like judicial procedures. But arbitration, transcending national boundaries more extensively, is an ideal subject for the kind of comparative study of whose possibilities we in America are so blissfully ignorant. This will be increasingly so as UNCITRAL's efforts to unify national arbitration laws bear fruit. The other 1969 document (A/CN.9/21) discussed possible measures for such unification and harmonization. A 1970 document (A/CN.9/42) deals with problems under existing arbitration conventions.

Last year an UNCITRAL working group studied time limits and limitations (prescription) in the international sale of goods. Its report (A/CN.9/30) considered the commencement and length of the prescriptive

<sup>3</sup> Arbitration activities of the U. N. Economic Commission for Europe and Economic Commission for Asia and the Far East were described in U.N. Doc. E/4714 at 12-13, 54 (1969).

period, as well as its suspension, prolongation and interruption. Also dealt with were modification of the period by agreement of the parties, recourse to barred claims by counterclaim or set-off, whether the court should raise the issue of prescription if the parties do not, and voluntary payment of barred claims. UNCITRAL's purpose is to produce a convention to unify and harmonize statutes of limitations. This legislative process is just as important for the international litigator to keep up with as if it were going on in his own State or national capital.

There are also many areas in which the United Nations is an indirect but still important consideration for the litigator as well as the planner. It is important to note that the United Nations and its family are very anxious to work with international corporations and their counsel. The United Nations seeks to aid private companies in the areas of exchange controls, investment rules, investment insurance, settlement of disputes, tax incentives, double tax treaties, joint ventures with local capital, local resource and local employment requirements, private loan capital, business legislation, regional economic integration, transfers of technology, etc. The lawyer's rôle in those categories is obvious: areas of conflict are much more numerous and unpredictable in the international arena than in the domestic one; and, as careful lawyers know, one cannot wait until litigation is pending to worry about the avoidance of conflicts. The United Nations is really the only concentrated source of information in the above areas.

Much of this information is found in surveys done by U.N. organs. The surveys take many forms from pre-investment, mineral detection, or plant-site selection studies, to collection of the laws and practices of a given group of states with regard to settlement of disputes, granting of tax incentives, etc. The latter particularly are invaluable guides in negotiations with sovereigns over exploitation rights or capital withdrawal restrictions. Often countries do not have indices to their national laws, making research particularly difficult and the surveys most valuable. A more pressing problem is that in many countries laws found on the books are theoretical: sometimes they are even ignored; the surveys give guides to actual practice which could otherwise only be gained through the hiring of costly consultants or through mere guessing. Moreover, guessing in these cases often does not involve the same factors as guessing in the case of, for example, a U. S. administrative ruling. The constituents are much different and it is essential that counsel be comfortable with all relevant features of the local tendencies. Moreover, one must keep in mind that local laws were enacted and policy statements made under then existing conditions, and that changes in political, economic and social problems, especially in developing countries, may endanger a government's ability to adhere to its promises; tactics in litigation should be guided accordingly, and United Nations materials provide a good source for this type of information.

In addition, some weight, varying with the particular case, can be given to a survey itself as a source of informal precedent and estoppel: coun-

tries are not likely to let their national pockets come second to a United Nations statement, but they are also loath to contradict a prior position in the eyes of those with whom they work every day and from whom they seek concessions in the General Assembly.

These surveys are part of a greater United Nations effort to unify and harmonize laws pertaining to international trade. Harmonization is largely the province of the International Institute for the Unification of Private Law (UNIDROIT), but other organs are heavily engaged in the effort. The work of UNCITRAL in the area of standardizing trade terms, time limits, etc., is discussed above. Interest in standardizing the law of pledges, security interests and guarantees is also stirring.<sup>4</sup> The fact that this area is one of the most sophisticated in United States law, and of the immense complexity of conflicts of laws dealing with it before the advent of the Uniform Commercial Code, gives a good picture of the crying need for international uniformity with which any litigator ever stuck in this mire is already familiar. The situation is made more critical, since many of the national laws counsel deals with have barely developed these concepts, in the face of a steadily increasing need for them as commerce grows: their laws "tend to obstruct rather than assist the creation of security instruments that would meet present day requirements."<sup>5</sup> UNCITRAL has undertaken a comparative survey in this area. It is fair to assume that countries needing rapid development here will look first for guidance to U.N. efforts to which they are already contributing. Thus, attorneys with a legislative inclination could help their commercial clients considerably by counseling these efforts in the right direction.

Negotiable instruments laws are also a target for consideration.<sup>6</sup> Surveys are now being made to catalogue different methods of making international payments, trends in the use of different methods and their determinants, settlement of problems of forgery and alterations, lost instruments, protest and other problems ever present in litigation.

International legislation on shipping and on Banker's Commercial Credits is also being considered.

United Nations Regional Economic Commissions and other satellite organs have made further contributions to easing the litigator's job. In litigation involving transit charges and customs restrictions, the Convention on Transit Trade of Land-locked States<sup>7</sup> can be cited for many freedom-of-transit principles. That convention deals with storage of goods during transit, free zones, emergency interference, public health and security restrictions, and dispute-settling procedures.

For import/export counsel U.N. surveys of customs systems can be invaluable, especially for developing countries where knowledge of local practice may be more important than knowledge of the law.<sup>8</sup>

Counsel in foreign investment disputes will be interested in the International Bank Studies on Multilateral Investment Guarantees and may

<sup>4</sup> U.N. Doc. A/CN.9/20/Add.1.

<sup>5</sup> *Ibid.* at 1.

<sup>6</sup> U.N. Docs. A/CN.9/19; A/CN.9/38.

<sup>7</sup> U. N. Doc. TD/Transit/9.

<sup>8</sup> See, e.g., Doc. E/CN.14/374.

want to put their dispute before the Center for the Settlement of Investment Disputes.

The International Civil Aviation Organization (ICAO) will be familiar to anyone practicing air law, for its requirements have kept many private litigators interested for some time. Litigators and planners who have been involved with capital protection, capital withdrawal restrictions, or hedging against inflation and revaluation will be familiar with the International Monetary Fund or the International Finance Corporation.

Standards of packaging, stowage, labeling, etc. of goods in shipping and a world-wide system of simplified and standardized documentation which will progressively replace the present, confusingly different national requirements have been put forward in conventions sponsored by the Inter-Governmental Maritime Consultative Organization (IMCO). Of course, these have to be accepted and built into national legislation, but because they are in the form of uniform legislation they have precedent value similar to that which Uniform Commercial Code decisions have among sister States.

Counsel in communications law are familiar with the United Nations rôle in COMSAT, an adjunct to which is that the United Nations now proposes the use of satellites to aid in making mineral explorations in remote areas. Banking counsel will be interested in loans recently made by U. S. banks to the United Nations for purposes of reloan to Yugoslavia.

The list of United Nations activities important to the litigator is extensive and goes far beyond those mentioned above. But one last mention should be made to all those who are involved in commerce and exploitation of natural resources. That is United Nations activities dealing with the law of the sea. Recently Brazil joined the growing number of Latin American nations claiming territorial waters 200 miles out into the sea. Over the last 15 years almost 100 U. S. fishing vessels have been seized and fined by Ecuador and Peru for fishing within their 200-mile limits. The danger of this is apparent. "The 200 mile limit, if applied by all nations and extended off their islands, would virtually do away with the traditional doctrine of a high seas open to all traffic, which has governed international traffic on the oceans for 150 years."<sup>9</sup> In response to this danger, many nations are turning to United Nations' efforts to establish a uniform 12-mile limit, which limit will itself close more than 110 straits. Nations heavily engaged in maritime commerce predict that if this limit is not adhered to, ships may eventually have to go through complicated licensing procedures in, pay taxes to, and submit to constant inspection by, every nation they pass. Some are also attempting more direct methods through the United Nations: For instance, the *Wall Street Journal*<sup>10</sup> reported that President Nixon is being urged to renounce American rights to billions of dollars' worth of off-shore oil and minerals far out in the Atlantic and Pacific Oceans. These urgings arise from a fear in many parts that if the trend of some nations to claim greater and greater spans

<sup>9</sup> The Christian Science Monitor, April 9, 1970, p. 4.

<sup>10</sup> Wall Street Journal, March 27, 1970, p. 1.

of territorial waters continues, international commerce would be stymied as discussed above. It is anticipated that such a give-up would be done through the medium of a United Nations Conference, at which the President would expect other nations to be satisfied with modest territorial seas and perhaps give up some rights themselves. The renounced resources might be used for United Nations support or some United Nations-directed activity. Oil counsel will be already aware of this proposal. Lest air law counsel see a possible benefit accruing to their clients, it should be pointed out that most countries consider their airspace to expand with their territorial sea; a clause to that effect was specifically reserved in the Brazilian pronouncement. This, then, is a perfect example of the case where private law counsel may eye the United Nations as the only workable forum for a solution.

Summing up, I should mention the vast United Nations fact-finding apparatus and its stores of information. The International Labor Organization can give companies information on local labor conditions; other organs can give information on tariff preferences, tax conditions, trade statistics, etc. This information can be cited in litigation and in bargaining. The United Nations Library law index can be invaluable. In many cases, the United Nations can provide materials hardly available elsewhere. In addition, counsel should keep in mind that the United Nations has huge numbers of experts on a world of topics and that these experts may at times be more helpful than any other single factor.

As the United Nations progresses toward its aims, its value will become more and more obvious to the litigator. Those who already realize this value are at the forefront of legal knowledge.

## PRACTICAL ASPECTS OF INTERNATIONAL LITIGATION

*By Howard H. Bachrach \**

The purpose of this report is twofold: to give the practitioner a brief outline of the main procedural steps that will confront him in contentious proceedings before the International Court of Justice; to suggest consideration of some reforms in that procedure.

### A. PROCEDURE IN THE INTERNATIONAL COURT OF JUSTICE

1. The first procedural step in initiating court proceedings is the filing of a special agreement by which the governments involved have resolved to submit the controversy to the Court. Barring such agreement, the case is submitted by way of an Application filed with the Court, which identifies the dispute as well as the parties and sets forth the basis on which it is claimed that the Court has jurisdiction.

All procedural documents must be submitted in one of the two official

\* Of the New York Bar.

languages, English or French, must be in printed form and filed in the prescribed number of copies—at this time 125.

2. The next step is the filing of the Memorial by the applicant state. In it, the plaintiff government develops the facts underlying the dispute as well as the jurisdictional basis and the applicable rules of law. The evidence will be contained in annexes to the Memorial. It is to be observed that the evidence, too, must be translated into the official language used by the party in the main text of the Application and of the Memorial.

Where the documents relied upon as evidence are too lengthy, relevant excerpts will suffice, as long as the complete text is filed with the Registry of the Court, unless such full text is already in the public domain, such as treaties or textbooks, already available in one of the two libraries housed in the Palace of Peace where the Court sits. As an alternative, a party may donate to the library the text of the publication.

3. At this point, the respondent government may interpose Preliminary Objections designed to have the Application denied otherwise than on the merits. The filing of objections (again the main text is to be supplemented by evidentiary material contained in annexes) casts the objecting government in the rôle of a plaintiff. The applicant government will file, in opposition, its Observations and Submissions. Oral argument will follow, the case being opened by the objecting respondent and concluded by the applicant government. In the most recent case before the Court—*Belgium vs. Spain*—such oral argument consumed 42 hearing days with respect to four Preliminary Objections raised by Spain.

The Court will then decide whether to dismiss the action as urged by the respondent, whether to reject the objection, or whether to join the Preliminary Objection or Objections to the merits. In the first alternative, *i.e.*, where the Court sustains a Preliminary Objection, the matter ends there. Where the objection is dismissed or joined to the merits the case continues, and the respondent government will file its Counter-Memorial replying to the Memorial. Thereafter, the applicant government will file its Reply, followed by respondent's Rejoinder.

I may add that the Memorial and Counter-Memorial shall contain the submissions of the parties; but in practice, these submissions are often extended or otherwise amended in the Reply and the Rejoinder.

Often the written pleadings are quite lengthy. In the most recent case before the Court, the written record, prior to oral argument, comprised some 14,000 pages. Also, the Court noted with regret that the time limits set by the Court had to be extended several times at the request of the parties,<sup>1</sup> as a result of which six years elapsed between the filing of the Application and that of the Rejoinder. If one deducts 16 months for the written pleadings, for the oral argument and for the judgment dealing with Preliminary Objections, the written pleadings concerning the main case still extend over a period of 4½ years.

The filing of the Rejoinder, in principle, is the end of the written pro-

<sup>1</sup> [1970] I.C.J.Rep. 7.



cedure, and the case is ready for the oral proceedings. The Rules of the Court provide that, after the written proceedings have been closed, no new documents may be submitted except with the express or tacit consent of the other party. If the other party withholds such consent, the Court will decide whether to refuse or permit their production. In the most recent case before the Court more than 4,000 pages of such new documents were filed, to a large extent while the oral proceedings were in progress.

Oral proceedings are not necessarily what the name implies. The Agent, who heads the team for his government, and his Counsel who are called upon to present the oral argument in one of the two official languages, are requested to submit 25 copies of the text of each speech to be delivered on a hearing day, at least a couple of hours before the time the Court opens. This measure is designed to speed up and facilitate the simultaneous translation into the other language. If it does not prevent a speaker from departing from his prepared text, it certainly discourages the practice. It is, moreover, important for the practitioner to realize that, unless his written speech contains full references to pleadings or precedent and unless he reads in open Court or refers to the full citation contained in the written text, the transcript will omit the reference, and the Court will be deprived of a useful tool, because corrections are but an incomplete remedy. The Registry is too overburdened at such time to provide each member of the Bench with corrected copies. I may mention, in passing, the invaluable help that the practitioner, especially the secretary of the delegation, will derive from maintaining close contact with the Registrar, the Deputy Registrar and their staff. They give generous assistance from their background of rich experience. Their organization is splendid. Transcripts of a day's proceedings are being made available within hours after the Court rises, generally between 10 p.m. and midnight of the same day. Translations are being provided the following day; and you are supposed to transmit to the Registry within 24 hours your corrections of the original text as well as of the translations of each speech.

As a rule, the applicant government opens the case; followed by the respondent government. A second round of oral argument—Reply and Rejoinder—follows. Each delegation will, before the commencement of its round, file with the Registry a list of its speakers, the order in which they will address the Court, as well as the prospective length of each speech. Theoretically, where Preliminary Objections have been joined to the merits, it could be expected that the objecting respondent should open the oral proceedings; but this was not done in the most recent case, and for good reasons, inasmuch as the objections had to be considered in the light of the merits. At the end of the oral proceedings the parties are to either confirm their previous written submissions, or to read their final submissions into the record. This ends the oral phase and is the commencement of the deliberations of the Court which will culminate in the Court's judgment.

## B. REFORMS

I shall now briefly deal with a few selected suggestions for reforms. Most of these suggestions are based on a common denominator: The Court, dealing not with ordinary applicants and respondents, but with sovereign states represented by Agents with ambassadorial status, has been understandably reluctant to interfere with the timing and the manner in which a case is presented to it. I submit that a review of this approach is appropriate, especially at a time when the Court is reportedly anxious to open its doors to a more substantial number of litigants.

1. My first remark is addressed to the extent of the written pleadings. Wherever the parties deal with factual issues or allegations which, even if true and uncontroverted, would have no bearing on the legal issue before the Court, it would shorten the pleadings if the Court, at an early stage, called on the Agents to appear before it, for the purpose of excising from the pleadings matters deemed irrelevant or immaterial. The judgment of the Court in the most recent case before it bears this out. That case involved a Belgian complaint concerning bankruptcy proceedings instituted in 1948 in Spain against a Canadian company in which Belgian shareholders had a substantial interest. The Respondent government (Spain) devoted hundreds of pages to the attempt of showing wrongdoing of the company and of individuals, going back as far as 1911. The Applicant government filed several hundred pages of text and material to refute these charges. The Court held<sup>2</sup> that even if the contentions of the Respondent government were substantiated, they would have failed to provide grounds for the acts complained of by the Applicant government. I submit that a substantial amount of time, effort and funds could be saved if such a conclusion were reached at an early stage of the proceedings; for instance, after the Counter-Memorial has been filed. At such time, either at the request of a party, or on its own motion, the Court could, acting as a full Bench or by forming a Chamber pursuant to Article 26 of the Statute and to Article 24 of the Rules, decide that certain matters be omitted from further written pleadings and oral argument. Such an order would also presumably reduce the submission of new documents. I believe that I am conservative in estimating that in the most recent case before the Court, the written pleadings and the volume of new documents would have been shortened by several thousand pages, and the oral proceedings would have consumed substantially less than 64 hearing days, if such a reform had been enacted.

2. Another reform could deal with the practice of filing new documents. I have touched upon one aspect of this question when referring to the excision from the record of irrelevant matters. We may observe that Article 48 of the Rules refers to "new" documents. It is reasonable to interpret that provision as referring to documents not in existence or not available when the written pleadings were filed, or to newly discovered evidence. Yet it has happened that a party, after the commencement of

<sup>2</sup> [1970] I.C.J.Rep. 51-52, par. 102.

the oral proceedings, filed as "new documents" transcripts from court records and decisions of foreign courts which had been in the public domain for several decades. This practice, which leads to refutation by "new" documents as old as the preceding ones, strikes one as abusive and in need of reform.

3. Another difficulty which the practitioner may encounter in oral proceedings, in the course of which new documents have been produced, is the propensity of an advocate to invoke or otherwise rely upon a new document before his opponent has had an opportunity to study this new evidence and either to consent to, or oppose its introduction. The Court, faced with a mountainous record, cannot always be expected to raise this objection on its own motion, though this could happen. This compels the other side to be on continuous alert and to lodge protests, which could give rise to procedural incidents; and this is but another reason why the use of this kind of evidence should be restricted.

4. A gray area well worth the effort of more stringent definition is the time at which the parties are to file their final submissions in the oral proceedings. Should a party file these at the termination of its first round of speeches, or at the termination of its second round (which seems to be the present practice, in the absence of rules to that effect), or should the final submissions be read and filed by the parties on the last hearing day? It is arguable that the solution last mentioned is preferable, inasmuch as it puts both parties on an equal footing, depriving the party that presents the closing argument of the advantage of framing its submissions with reference to those of its opponent. Submissions are not a pleading but a framework designed to assist the Court in formulating its decision.

5. Time permitting, I should discuss at some length the problem of discovery in proceedings before the International Court of Justice. Time being short I shall restrict my remarks to some aspects of this problem:

Pursuant to Article 52 of the Rules, the Court and the individual judges have the right to put questions to those appearing before it. Pursuant to the Statute and the Rules the Court has the right to call for the production of documents and for the provision of explanations. I need not tell this forum that judges not infrequently avail themselves of this prerogative to ask questions. Moreover, in the recent *North Sea Continental Shelf* case, the parties were asked by the Court and by a judge to produce certain documents; and they complied with these requests. Members of the International Court of Justice have reminded the legal community<sup>3</sup> that international tribunals have no fully developed practice of rules of evidence. It could be argued that the International Court of Justice should perhaps create such a body of rules of evidence. Their existence would give the parties appearing before it better guidance in presenting their case. They could evaluate with greater certainty what evidence is admissible. More importantly, perhaps, having regard to the great differences between the Anglo-Saxon and the Continental systems of evidence, they would know whether unfavorable inferences could be drawn from failure

<sup>3</sup> [1970] I.C.J.Rep. 98, 215.

to produce evidence. This codification in the Rules of the Court could, for instance, spell out that such a sanction would follow from disregard of a request for production when made from the Bench or when a party has disregarded a request for production made by the opposing party and upheld by the Court.

6. In concluding I shall deal, as succinctly as possible, with very important dicta contained in Judge Jessup's individual opinion in the most recent case before the Court.<sup>4</sup> Citing with approval writings and opinions of Sir Hersch Lauterpacht, Sir Gerald Fitzmaurice and Judge Tanaka, Judge Jessup stressed the importance for judgments of an International Court to deal with the main issues before it. Concretely, where several Preliminary Objections are before the Court and the case is dismissed on the basis of one of them, Judge Jessup regrets the tendency not to pass on the others. This, I believe, is sound reasoning if one believes with Judge Tanaka that

the more important function of the Court as the principal judicial organ of the United Nations is to be found not only in the settlement of concrete disputes, but also in its reasoning, through which it may contribute to the development of international law.<sup>5</sup>

But is it permissible to go beyond these dicta? I invite you at least to reconsider with me the situation where Preliminary Objections regarding jurisdiction have been disposed of and the case has been argued on the merits, but the respondent "particularly in its written pleadings (did) deny that the Applicants had any legal right or interest in the subject matter of their claim."<sup>6</sup> This is, of course, the situation that arose in the *South West Africa Cases*, second phase. It involved, in Judge Spender's words, "a preliminary question of the merits"<sup>7</sup> which the Court decided in favor of the respondent state.

Once a case has reached the stage of a discussion of the merits it is at least arguable that it should not stop "at the threshold of the case."<sup>8</sup> Would it not have been preferable to discuss the merits, if only (to cite Sir Hersch Lauterpacht) "because it is important that Justice should not only be done, but that it should also appear to have been done."<sup>9</sup> It is even conceivable *ex hypothesi* that a full consideration of the merits could lead the Court to adopt a different view from that derived from the isolated consideration of an objection. But, leaving speculation aside, "the influence of the Court's decisions (in Judge Jessup's words) is wider than their binding force."<sup>10</sup> Would it therefore not have been preferable if, besides dealing with the standing of Ethiopia and Liberia, the Court had indicated, even by way of *obiter dicta*, whether or not "the policy and practice of apartheid in . . . Southwest Africa is compatible with the dis-

<sup>4</sup> [1970] I.C.J.Rep. 162-164.

<sup>5</sup> [1964] *ibid.* 65.

<sup>6</sup> [1966] *ibid.* 19.

<sup>7</sup> *Ibid.* 55.

<sup>8</sup> *Ibid.* 323.

<sup>9</sup> Lauterpacht, *The Development of International Law by the International Court* 39, Ch. 3 (Rev. ed., 1958).

<sup>10</sup> [1970] I.C.J.Rep. 163.

charge of the 'Sacred Trust' confided to the Republic of South Africa?"<sup>11</sup> I cannot help feeling that such a course of action would have significantly contributed to the development of international law. And this is, beyond peradventure, one of the "*raisons d'être*" of the International Court as an organ of the United Nations. It is its own and mankind's best hope.

## PRACTICAL ASPECTS OF INTERNATIONAL LITIGATION—ARBITRATION

*By Henry P. de Vries \**

We have heard reports on United Nations activities of importance to the legal practitioner and on procedural aspects of the International Court of Justice. After these solid meat courses I propose to serve dessert with a topic which permits us to push our chairs back and exchange ideas without need for technical preparation. The general area of my discussion is international arbitration; the specific topic, the rôle of the party-appointed arbitrator.

At the outset, a few preliminary remarks to establish the setting are in order. As in all matters of importance to the practitioner, the topic of an impartial tribunal discussed here has two aspects: the legally permissible and the realistically effective. We also should note at the outset that the topic poses the paradox implicit in the application of the maxim that no one should be judge in his own cause to the arbitral process, a voluntary submission of the parties to judges of their own choosing. Indeed, Mr. Justice Black of the Supreme Court of the United States has indicated that in arbitration the parties should insure that their arbitrators be even more impartial than judges, saying

we should, if anything, be even more scrupulous to safeguard the impartiality of arbitrators than judges, since the former have completely free rein to decide the law as well as the facts, and are not subject to appellate review.<sup>1</sup>

The issue is essentially one of striking a balance between the requirement that the tribunal be impartial and recognition of the right of the parties to select persons in whom they have confidence. These objectives are not, of course, necessarily inconsistent and various ways of organizing an arbitral tribunal reflect differing approaches. It is in the tripartite arbitral tribunal that the issue of the party-appointed arbitrator is most often presented: the provision for appointment of an arbitrator by each party with both agreeing on a third member.

The question arises of the law to be applied. Without time for a detailed exposition, suffice it to say that both the law of the place of arbitration and that of the place of enforcement of the award must be considered.

<sup>11</sup> [1966] *ibid.* 323.

\* Columbia University Law School.

<sup>1</sup> *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 89 S. Ct. 337, 340; 393 U.S. 145, 149 (1968).

No legal system grants a party absolute discretion in the appointment of an arbitrator. In considering the law on party-appointed arbitrators a distinction can be drawn between the American system and the European-Continental system. Perhaps reflecting the strongly adversary nature of American litigation in general, our laws and court decisions tend to focus on the requirement of impartiality or neutrality of the third member of the tribunal. Thus, the New York Civil Procedure Law and Rules (C.P.L.R. §7511(b)(1)(ii)) provide that only the partiality of an arbitrator "appointed as neutral" can be ground for vacating an award. This provision "takes cognizance of the common practice of each party appointing his own arbitrator who is not individually expected to be neutral."<sup>2</sup> Almost half a century ago, the New York Court of Appeals insisted that even a party-appointed arbitrator

acts in a quasi-judicial capacity and should possess the judicial qualifications of fairness to both parties so that he may render a faithful, honest and disinterested opinion . . . . he is not an advocate whose function is to convince the umpire or third arbitrator, nor are arbitrators champions of their nominators." (*Matter of American Eagle Fire Ins. Co. v. New Jersey Ins. Co.*)<sup>3</sup>

However, more recently the same court has held that an arbitrator appointed by a party may be "partisan" though the line will be drawn at dishonesty evidenced by being "deaf to the testimony or blind to the evidence presented" (*Astoria Medical Group v. Health Insurance Plan of Greater New York, Inc.*).<sup>4</sup>

The legal test in the American system is whether there has been disclosure. Indeed, in a case that appears extreme in its application of the rule of disclosure as the only test, the Appellate Division of the Supreme Court in New York upheld an award by a partner of a law firm which had been representing one of the parties, even though the partner acted as sole arbitrator, on the ground that the other party knew of the conflict of interest when it participated in designating the arbitrator (*In re Arbitration San Nicolas S.A. v. Pangalante S.A.*).<sup>5</sup>

In contrast, in Western Europe and Scandinavia, no statute or court would admit or imply that a party-appointed arbitrator can be partisan, and indeed the fullest disclosure does not suffice. Thus in Germany an arbitral award has been vacated where the parties with full knowledge appointed their own lawyers as arbitrators of a dispute between them. In the Swedish Arbitration law of 1929 an arbitrator who as an attorney of a party has assisted that party in preparation of the case or in its presentation may not be appointed. Under the rules of the Technical-Industrial Institute of Arbitrators of Sweden all the arbitrators are appointed by third persons and the parties are not permitted even to recommend arbitrators.

<sup>2</sup> N.Y.S. Legis. Doc. No. 13(1958), p. 146.

<sup>3</sup> 240 N.Y. 398, 148 N.E. 562 (1925).

<sup>4</sup> 11 N.Y. 2d 128, 227 N.Y.S.2d 401 (1962).

<sup>5</sup> Sup. Ct., App. Div., 1st Dept., 248 N.Y.S.2d 143 (1964).

As a matter of wise counseling, the strictest legal standards should be followed. Though the place of arbitration be in the United States, recognition or enforcement of the award abroad may be necessary for full legal effectiveness. The highest standards of impartiality should be followed to protect the award internationally.

In international arbitrations, whether at a public or private level, the practical aspect operates to support the highest legal standards. The parties should realize that the ultimate determination in a tripartite arbitration will rest with the third arbitrator. It must be assumed that anyone serving in that capacity, chosen for ability and integrity and disassociated from previous connection with either party, will react against the influence or suggestions of a partisan colleague. The party-appointed arbitrator must be of sufficient standing to command the respect at the outset from the chairman of the tribunal; he must be completely at ease in the language or languages of the tribunal, and be capable of dealing with public and private law concepts in an international context.

The point may be overly subtle, but in my experience the third arbitrator expects the party-appointed arbitrator to show a special interest in the presentation made on behalf of his nominator. But he resents the presence and actions of a colleague sensed to have prejudged the case or to be subject to the influence or instructions of the appointing party. Therein lies the crux of the matter from both the legal and practical point of view. The party-appointed arbitrator must be truly impartial yet ensure that in the course of the tribunal's deliberations full understanding is attained by the entire tribunal of the presentation of facts and law advanced by his nominator. He should retain at all times the freedom to decide specific issues as well as the general decision on the merits against the party appointing him, yet assist his co-arbitrators in the fullest possible consideration of all relevant facts and points of law. If both party-appointed arbitrators act on this assumption, emphasizing only points which may have been ignored in the course of a long proceeding and approaching the final deliberation with minds open to conviction, the arbitral process will have fulfilled the expectations of impartiality and confidence in the arbitral process sought by the parties in agreeing to be bound by judges of their own choosing.

The CHAIRMAN then declared the meeting open for discussion. He observed that the speakers had emphasized in their talks that parties engaged in international litigation must have confidence in the adjudicative process. He pointed out that the Rules of Conciliation and Arbitration of the International Chamber of Commerce require that a party-appointed arbitrator may not be a close professional or business associate of such party, and he commented that this provision was similar to the requirement of the Statute of the International Court of Justice whereby an *ad hoc* judge of the Court must take the same oath to judge the instant case objectively as is taken by a permanent judge on the Court when he takes his seat. He said he believed that these similar requirements were sympto-

matic of a dilemma between the attempt of tribunals and courts to attract litigants and their overriding objective of assuring confidence in the adjudicative process among the parties in a situation where the case is submitted to the tribunal voluntarily. He asked the panelists whether they thought that these requirements actually operated as an incentive to hypocrisy, or whether they constituted ballast necessary to maintain continuing confidence that disputes would be resolved with due regard to the interests of the parties.

Professor DE VRIES stated that the most important purpose of any adjudicative rules, whether governing a court proceeding or an arbitration, was to bolster the confidence of the parties in the dispute-settling system, and to convince each side that its arguments would be heard and fully considered on the merits. He observed that in an arbitration the proceeding usually begins voluntarily, but that the parties thereafter lose control over the adjudicative process so that it is especially important to maintain the confidence of the parties in the system in that context. He noted that for this reason it was important for arbitrators, whether panel-appointed or appointed by the parties, to be required to maintain an open mind in order to hear both sides of an issue. He noted, however, that occasionally a rule intended to promote impartiality actually could have the opposite effect. For example, national legislation concerning arbitration in Brazil, Italy, and Greece requires that neutral arbitrators must be nationals of those respective countries.

The CHAIRMAN asked the panelists whether they would advise that an arbitration clause be included generally in international agreements between parties of different countries, for example, in a licensing agreement being negotiated with an American licensee on behalf of a foreign licensor.

Mr. BACHRACH said that he would advise inclusion of an arbitration clause in such an agreement if potential disputes contemplated under the agreement involved questions of fact, or if they involved questions of law and it were insured in advance that the arbitrators would be both impartial as well as fully familiar with the governing law of the agreement. He quoted Article 17 of the Statute of the International Court of Justice, whereby no member of the Court may participate in a case in which he has been previously involved, and he advised that the language of Article 17 be adapted to the appointment of arbitrators in an arbitration proceeding between private parties.

Mr. CAREY stated that, on behalf of the American party in the hypothetical situation posed by Mr. Gross, he would ask that all disputes be submitted to the courts of the State of New York. If the other party did not agree to such a clause, he said that he would agree to an arbitration clause, but would insist that there be no party-appointed arbitrators.

Mr. A. BROCHES, General Counsel of the International Bank for Reconstruction and Development (World Bank), and Secretary General of the International Center for the Settlement of Investment Disputes, mentioned certain provisions of the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States of March 18, 1965.



He pointed out that, while Chapter IV of the convention allows the parties to select arbitrators by their own procedure, Article 39 requires that the majority of the arbitrators be nationals of states other than the state party to the dispute or the state whose national is the other party to the dispute, unless all arbitrators are appointed by agreement between the parties. He noted in addition that all arbitrators selected under the convention must, under Article 14, be persons of "independent judgment," a term not further defined but presumably used in a European sense to require that arbitrators have no business or professional connection with either party. Mr. BROCHES stated that, at the time the convention was adopted, there was a consensus that the provisions of Article 39 would be an interesting departure from other rules of arbitration which had been attempted, the justification being that for an arbitrator to be of the same nationality as one of the parties might impose too great a strain upon his "independent judgment." He asked Professor de Vries whether he thought that the provisions of Article 39, disallowing, as a rule, the appointment of arbitrators of certain nationalities, but allowing such appointment nevertheless by agreement of the parties to the naming of specific individuals, appeared to him to be an acceptable compromise in such a situation.

Professor DE VRIES noted that an extremely delicate situation can develop where the arbitrators are of the same nationality as either or both of the parties. He recalled that he had once been proposed as the party-appointed arbitrator of an American oil company in a dispute with the Algerian Government, but had recommended that a French national be substituted instead.

Dr. IVAN SOUBBOTITCH stated that he had two observations. First, he expressed his opinion that the procedural rules of the International Court of Justice, as they had been laid down in 1920 and as developed *ad hoc* since then, were perfectly adapted to any kind of litigation that might come before the Court. He said he believed that any attempts to revise the procedural rules of the Court would only result in indecision and confusion. Secondly, he noted that the panelists had not discussed one very important problem concerning international arbitration, in particular, the problem of the enforceability of an arbitration award. He noted that an arbitration award rendered in the State of New York was not enforceable on its face in the Province of Quebec, and he recalled that an award which he had rendered as an arbitrator appointed in New York under the International Chamber of Commerce Rules had been enforced in Quebec only because he had signed the award there.

Mr. BACHRACH pointed out that practitioners of international litigation have a continuing and vital interest in procedural reform of the International Court of Justice, especially as concerns the rules of evidence before the Court. He referred to the separate opinions of Judge Philip Jessup and Judge Sir Gerald Fitzmaurice in the *Barcelona Traction* case, discussing the lack of a fully developed practice on rules of evidence that should be applied by the Court.

Professor HANS W. BAADE pointed out the increasing tendency of Ameri-

can courts to favor arbitration clauses. He noted the recent case of *Batson Yarn v. Saurer-Allma*, 311 F. Supp. 68 (D.S.C., 1970). Here, a German company had terminated a distributorship contract with a South Carolina company, and the latter brought action in Federal District Court. The court granted a stay pending arbitration, because the distributorship contract contained an arbitration clause calling for arbitration in Germany under German law. It held that the issue was governed by Federal substantive law, which generally favored arbitration clauses, and that under Federal substantive arbitration law choice-of-forum clauses calling for arbitration abroad as well as choice-of-law clauses calling for the application of foreign law were enforceable. The court derived additional support from Article VI, sec. 2, of the 1954 Friendship, Commerce and Navigation Treaty with West Germany, which in terms only eliminates disqualifications based on the nationality of the arbitrator or the place of arbitration. Professor BAADE contrasted this decision with the current state of general United States international conflict-of-laws rules, which are still quite uncertain as to the validity of choice-of-forum and choice-of-law clauses, to say nothing about the recognition of foreign judicial decisions. He noted that this discrepancy would further increase with the ratification of the 1958 U.N. Convention on International Commercial Arbitration, which seemed now assured. On the question of objectivity and bias, Professor Baade noted that, pursuant to the rules of the American Arbitration Association, either party to an international commercial arbitration was entitled to request the appointment of an arbitrator who was not the national of either party, but that his limited experience as a non-citizen member of the National Panel of Arbitrators indicated that this option is little used.

Mrs. ROSALYN HIGGINS directed two comments to Mr. Bachrach's suggestion that judges of the International Court of Justice be permitted to render *dicta* on the substance when preliminary objections are sustained. She commented that such an innovation might further diffuse the quality of judgments—judgments which are already frequently overshadowed by the bulk of separate and dissenting opinions—and diminish the judgments' prestige. She noted also that the incorporation of *dicta* concerning the merits of a case in a decision rendered concerning preliminary objections might deter a nation with a strong case on its preliminary objections from submitting disputes to the Court in the future in anticipation that the judges might pronounce on the merits as well.

Judge HARDY DILLARD, of the International Court of Justice, outlined briefly the work of a committee of the Court which is currently reviewing the question of procedural reform generally. He observed that the procedure of the Court had been developed in the past basically as a compromise between the Anglo-Saxon and the Continental systems of law. He agreed with Mr. Bachrach, however, that a procedure which had worked well in the past might not necessarily be the best for the future.

Turning to the impact of a judge's nationality on the objectivity of his judgment, he suggested that attempts to find a pattern of national prejudice—and the voting records of the judges have been subjected to numerous

types of analysis—should be viewed skeptically for a number of reasons which Judge Hudson and others have exposed. In the first place, he explained, the “cases” are a complex of many issues, and you might find a judge, as in the *Corfu Channel* case, voting for his nation’s position on some issues and not on others. In the second place, there is always the lurking danger of committing the logical flaw of hasty generalization. It is like the old quip about a logician coming to the conclusion through the logical process known as “inference through agreement” that soda water makes a man drunk since every time he drank bourbon and soda water, Scotch and soda water, brandy and soda water, gin and soda water, vodka and soda water, he got drunk. It could be that a judge votes for his nation because his nation’s legal position is sound. This “variable” may elude the pattern approach, just as alcohol eluded the quasi-logician. Finally, third and very important, you have splits on the Court, as Rosalyn Higgins and others have shown, for the same reason you have splits in the national domain, that is, because of the philosophical presuppositions of the judge, a factor bearing not on whether law “exists” but on its meaning and the process of interpreting and construing its application in context. It is not without interest that in the final *South West Africa Cases* you find judges from the United Kingdom and Poland lining up on one side and those from the United States and the U.S.S.R. on the other. A more consistent nationally oriented pattern is, admittedly, visible with respect to *ad hoc* judges.

Of course, the same basic restraints against whimsical and arbitrary judgments obtain in the international as in the national domain. Judge DILLARD referred specifically to two factors: first, the chiseling-down process which adjudication entails, that is, the need to forge issues so that one side wins, a process which reduces vague differences to specific disagreements; second, the fact that the judge must give or subscribe to a *reasoned* judgment that is put in the public domain for critical appraisal. As Brandeis remarked, “Sunlight is supposed to be one of the best of disinfectants.”

Mr. HOWARD E. HENSLEIGH questioned whether Judge Dillard’s remark applied to the Court as it is or as it should be. He noted that in the *Barcelona Traction* case the Court had held that the state of incorporation of a company is the only state entitled to represent that company’s interests before the Court. He pointed out that judges of the Court often appear to be looking for an excuse to deny standing to a party before the Court in order to avoid an award on the merits. He suggested that this development might result in states having less recourse to the Court in the future as a means of settling their disputes with other states.

Professor CHARLES EVAN commented that he believed it was impossible to speak of “international litigation” in general terms; and that the notion of “impartiality” had very different meanings, depending on the philosophy-ideology in the light of which it was observed. He noted that both in the so-called East and West, legal concepts, including such as, for example, the concept of ownership, were undergoing a great change. If we wish to discuss “international litigation” in which a state is a party to the dispute,

we have to classify the nature of the dispute, litigation, and of the state's interest therein. Litigation between states *qua* sovereigns before the International Court of Justice is substantially different from other types of litigations which also may be referred to as "international" and in which the state may be a party with another and different type of interest, traditionally referred to as being of a private law or commercial nature, involving acts sometimes classified as acts *iure gestionis*.

Judge EDUARDO JIMÉNEZ DE ARÉCHAGA, of the International Court of Justice, referred to Judge Dillard's remarks concerning the Court's current review of its procedures with a view to possible reform, particularly in connection with acceleration of proceedings and reducing the cost to states parties of submitting a dispute to the Court. He suggested as one possible piece of reform that parties to a dispute not be required to submit a reply and a rejoinder, unless required to do so by the Court or unless both parties agree to submission of such further pleadings.

Mr. GROSS stated that he believed such an amendment of the Statute of the International Court of Justice would be inadvisable in the light of his experience before the Court. He recalled that in the *Southwest Africa* case, he had filed a brief memorial during the first phase on behalf of Liberia and Ethiopia, because the Applicants in the case did not know whether South Africa would appear; the Memorial had pleaded only those facts and supporting legal arguments sufficient to state a *prima facie* case on behalf of the Applicants. After South Africa filed a Counter-Memorial, however, Liberia and Ethiopia filed a reply brief which constituted their main brief in the case. If the Applicants had been required to state their entire case in their Memorial, he noted, they might have incurred substantial costs which would have been useless if South Africa had then failed to appear. Mr. Gross urged, however, that the Court should exercise tighter administrative control over the substance and the time of pleadings to prevent dilatory tactics on behalf of states parties. He commented that failure to exercise such control out of respect for the sovereignty of states parties could lead to the imposition of overly burdensome costs on developing countries seeking to submit a dispute to the Court.

Mr. STEPHEN B. COHEN agreed with Mr. Gross that most lawyers would appreciate a tightening of the Court's procedure. He asked the panelists and the Judges of the Court who were present whether they had any suggestions for inducing potential litigants to use the Court, or, possibly, for increasing the Court's business by making it available for certain kinds of arbitration proceedings.

Judge JIMÉNEZ DE ARÉCHAGA pointed out that the Court's committee on the revision of the rules is also studying, as a means of expediting the Court's procedure and reducing cost, the ways and means of increasing the hearing of cases by summary procedure (by chambers composed of five or three judges under Article 26 or 29 of the Statute of the Court), as frequently urged by former Judge Philip Jessup.

Judge DILLARD agreed with Judge Jiménez de Aréchaga that the summary procedure provided for in Article 29 had almost never been used, but was always available to the parties and might serve as a less expensive and more expeditious way of deciding cases. He recognized that the question of why the Court was not resorted to more often by states was being discussed widely. He suggested that the answer was not so much that the process was expensive or that many states had been disappointed by the decision in the *Southwest Africa* case. The problem went much deeper and is located in factors that are sociologically and psychologically oriented. He noted in this connection that the American Connally Reservation was symptomatic of an attitude of excessive caution. He emphasized, however, that the Court was eager to take on any and all cases that might be submitted to it in the future.

The CHAIRMAN observed that the Statute of the Court merely provides the tool to be used by judges and by practitioners before the Court. He suggested that amending the Statute of the Court was not as important as inducing states to resort more frequently to submitting their disputes to the Court.

The CHAIRMAN then thanked the assembled group on behalf of the American Society of International Law. The meeting thereupon adjourned at 4:25 p.m.

## FIFTH SESSION

Sunday, April 26, 1970, at 9:30 a.m.

### Business Meeting

Pursuant to the notice of the meeting published in the January, 1970, issue of the *American Journal of International Law*, the Business Meeting of the American Society of International Law convened on Sunday, April 26, 1970, at 9:30 a.m. in the Jade Room of the Waldorf-Astoria Hotel, New York. Oscar Schachter, President of the Society, presided.

Mr. STEPHEN M. SCHWEBEL presented his report as Executive Director of the Society. He noted the substantial increase in membership during the past year. Membership exceeded 5,000 for the first time in the Society's history. He said that he had heard very favorable comments on the program of the Annual Meeting this year, which was held outside of Washington for the first time since the Society's founding. He expressed special appreciation to John N. Hazard, Chairman of the Committee on the Annual Meeting.

The regional meeting program had been full, and the programs generally were excellent. The attendance at regional meetings was fairly good.

In addition to the Society's periodical publications, several books, growing out of research commissioned by the Society in earlier years as well as more recent work of the study panels, would be published in the course of 1970. The forthcoming books included: the case studies commissioned by the Panel on the Rôle of International Law in Civil Wars, to be published by the Johns Hopkins University Press under the title, *The International Law of Civil War*; *International Telecommunications and International Law: The Regulation of the Radio Spectrum* by David M. Leive, to be published by Sijthoff; *Foreign Enterprise in Mexico: Laws and Policies*, by Harry K. Wright, to be published by the University of North Carolina Press; *Nuclear Proliferation: Prospects for Control*, composed of papers contributed by members of the Panel on Nuclear Energy and World Order, to be published by Dunellen Press.

Mr. SCHWEBEL reported that some twenty panels of the Board of Review and Development were now in being. A large portion of these were currently active. Some were in the process of winding up their work and books or reports could be expected from them. Several panels were in the process of being formed.

The circulation of the *American Journal of International Law* had increased with the rising membership. There had been a dramatic increase in the circulation of *International Legal Materials* as a result of the special campaign launched in 1969.

Mr. SCHWEBEL reported that John Lawrence Hargrove had been appointed Director of Studies to work with the Board of Review and Development, to direct the work of the study panels, and to ensure the wider

dissemination of the work of both the Board and the panels. Mr. Hargrove is a graduate of the New York University Law School and holds the degree of Doctor of Philosophy from Harvard University. He had served in the Office of the Legal Adviser of the Department of State and was currently Senior Adviser for International Law to the United States Mission to the United Nations. He would join the Society's staff on May 12, 1970. At this point, Mr. Schwebel introduced Mr. Hargrove to the meeting.

Mr. SCHWEBEL announced the resignation, effective June 30, 1970, of Richard W. Edwards, Jr., who had been with the Society since 1961 and was currently the Assistant Director of the Society and the Editor of *International Legal Materials*. He spoke of Mr. Edwards' long, devoted, and very able service to the Society, the membership and teaching surveys he had made, his work with the Board of Review and Development, his leading part in the establishment and development of *International Legal Materials*, and the personal assistance Mr. Edwards had given to him as Executive Director. Mr. Schwebel expressed sincere regret at Mr. Edwards' departure from the Society's staff both for himself and for the Society.

Turning to Mr. Schachter, Mr. SCHWEBEL said that he had mixed feelings on the conclusion of his term as President: regret at his departure and welcome for Harold Lasswell. He said it had been a special privilege to work with Mr. Schachter, and a special pleasure as well. He said they were old friends, and he felt it was fair to say that during this association they had become, if anything, friendlier. He said he had leaned on Mr. Schachter very heavily, sending him copies of nearly everything he wrote. Mr. Schachter had brought to the position those qualities of mind and character that have long made him an outstanding figure in the profession and among those fortunate enough to be his friends.

President SCHACHTER thanked Mr. Schwebel. He expressed appreciation to Mr. Schwebel for all his help, and said how impressed he was with his ability. He said he was particularly impressed by the volume of correspondence Mr. Schwebel managed to carry on. He remarked on the tremendous amount of work Mr. Schwebel does for the Society and of his conscientiousness in following up on things. He said working with Mr. Schwebel had involved a good deal of intellectual activity and that Mr. Schwebel's active leadership had actually resulted in giving the President more and more to do.

President SCHACHTER spoke of the arduous negotiations and time spent in trying to secure the third major grant from the Ford Foundation, upon which so much of the Society's activities depend. He mentioned that these negotiations had been started by John F. Stevenson during his term as President.

The negotiations now were practically concluded. The officers of the Society were authorized to say that, as far as the staff of the Ford Foundation was concerned, it could be announced that the third grant has their approval but still remains to be approved by senior officers of the Foundation. He said the terms of the proposed grant were complicated and he preferred to have Mr. Schwebel make a statement.

Mr. SCHWEBEL said that discussions with the Ford Foundation regarding a third grant began early in 1968. The staff of the Foundation then made it clear that continued Ford support of the Society could be expected, but at a much lower percentage of the total of the Society's budget than in the past. The application submitted by the Society in April, 1968, was drawn with that in mind. The application sought support for five years. Mr. SCHWEBEL said that he would not trace in detail the history of the discussions over more than a two-year period. The sum and substance was that a third grant had been recommended by the staff of the Foundation, as Mr. Schachter had said. Instead of an outright grant for five years, the Foundation staff had recommended the full amount requested for the first three of the five years sought, with the requirement that, after the first year, the Society provide a proportion of matching funds to generate full payment of the Foundation grant. In practical terms this means that the Society must raise substantial additional funds from other foundations and generate considerably more income from its own resources.

In view of the need to increase revenues from non-Ford sources, the Executive Council on April 24, 1970, raised the schedule of membership dues and subscription prices effective January, 1971. Efforts would also be energetically pursued to obtain additional income from other foundations. As it is, there is little margin between the funds available and the Society's minimal needs.

President SCHACHTER thanked Mr. Schwebel and asked if there were any questions or comments. Mr. SCHACHTER then called on Richard Young to present the report of the Committee on Annual Awards.

Mr. RICHARD YOUNG, Chairman of the Committee on Annual Awards, referred to the report of the committee, which had been circulated. He stated that the committee unanimously recommended that the Society's Certificate of Merit be awarded to Professor J. H. W. Verzijl, for his work, *International Law in Historical Perspective*. The committee in its report said that the work "is a major contribution to the literature of international law. Representing the mature thought of an eminent scholar, it is distinguished by perceptiveness, deep learning, and a notable catholicity of view. The author's knowledge both of practice and of scholarly writings in many languages brings impressive support to his historical insights. The work is imbued with a spirit of humane understanding, enhanced by a felicitous literary style."

Professor JOHN N. HAZARD moved that the recommendation be accepted. The motion was seconded, and passed unanimously.

In the absence of the chairman of the Committee on the Selection of Honorary Members (Herbert W. Briggs), Mr. SCHACHTER referred to the report of the committee which contained highlights of the career of Roberto Ago of Italy and recommended his election as an Honorary Member of the Society. Mr. SCHACHTER said it would take too much time to tell all the accomplishments of Mr. Ago, who was considered by many to be one of the most brilliant of the "present crop" of international lawyers. He asked if he could take it that the recommendation of the committee was ac-



cepted, whereupon the recommendation was moved, seconded, and carried unanimously.

Professor HAZARD made the suggestion that the names of all Honorary Members be regularly listed in the *Proceedings*.

President SCHACHTER then called upon John Carey, Chairman of the Committee on Publications of the Department of State and the United Nations. Mr. CAREY said all of the members of the committee had worked very hard to gather the material embodied in the report. He then went over a number of points it made. He said that, although the Department of State's schedule called for the publication of nine volumes of *Foreign Relations of the United States* in fiscal 1971, only four are sure to be published and it was doubtful about the publication of the other five. With regard to archives, Mr. CAREY said the committee thought the regulations pertaining to their use by scholars could be improved. Referring to the documentary material of the U.N. Committee on Racial Discrimination he said that at the present time the documentation is available only to members of the U.N. Committee. Going on to *travaux préparatoires*, Mr. CAREY called attention to the proposal to substitute minutes for summary records of the meetings at the United Nations. He then paid tribute to the recent UNITAR publication, *Wider Acceptance of Multilateral Treaties*. He called attention to the new periodical, *Human Rights Bulletin*. Referring to the 1967 *Juridical Yearbook*, he called attention to the inclusion in it of the letters between the U.N. and Italy settling the claims lodged by the Italians for damage by the U.N. Force in the Congo. He also mentioned the United Nations Document Index, UNDEX.

Then Mr. CAREY discussed two resolutions proposed by the Committee on Publications of the Department of State and the United Nations. He moved the adoption of the resolutions and Professor HAZARD seconded the motions.

President SCHACHTER said Mr. Carey and his colleagues had done a good deal of digging to get the information in their report. He believed it would be a useful document for many people in the Society and others. While any journalist had ready access to most U.N. documentation, scholars in the field often did not. He then asked for discussion of the resolutions.

Dr. EGON SCHWELB, referring to the proposed resolution on the documentation of the U.N. Committee on Racial Discrimination, thought the draft was too severe. He felt it would be unwise to publish all of the material of the Committee which would include complaints and other documents that should be kept confidential. He felt some amendment should be made in the resolution to the effect that when the Committee on Racial Discrimination believed it necessary it should have the right to restrict publication.

President SCHACHTER said this matter had also concerned the Executive Council of the Society and that the Council had softened the original wording of the resolution. The proposed resolution that had been circulated contained the revised wording.

Mr. SCHACHTER then called on the chairman of the committee to comment.

Mr. CAREY said he had the point in mind and hoped the matter had been taken care of by the change made by the Executive Council. He felt that "customary procedures" would make allowance for that.

Dr. SCHWELB said that, in view of the explanations of the *travaux* of the proposed resolution, he was satisfied, but he wondered whether the language was clear.

Professor MICHAEL H. CARDOZO addressed himself to the proposed resolution dealing with more prompt publication of *Foreign Relations of the United States*. He said much depended on the amount of money the Department of State gets and also what it asks for. In Washington, he said, there had been organized a committee, made up of thirty or forty organizations concerned with educational and cultural matters, which meets regularly to consider what the group can do to help the Department of State and other agencies of government obtain the funding needed to carry out programs of interest to the academic community. He said he would like to see the Society collaborate with this group and asked for a vote to give support to this idea. He asked that an additional paragraph embodying this idea be added to the resolution.

Professor MAXWELL COHEN said he had long been concerned with one of the problems mentioned today: the almost impossible position in which most scholars find themselves in trying to obtain United Nations material. They usually have to go to their own national delegation because the Information Office does not have the files or the information or the willingness to help.

President SCHACHTER said the volume of material was enormous and of course would be costly to publish.

Mr. CAREY agreed that U.N. documents in general are not sufficiently available to interested scholars. He said they could go to the library and read them and take notes, but could not get copies to take away, whereas representatives of the press (virtually any paper) can get everything they want from the press room.

President SCHACHTER suggested that the business meeting vote on the substance of the proposals presented by Messrs. Cohen and Cardozo rather than attempt to draft specific language. He suggested that the suggestion of Professor Cardozo take the form of an amendment to the proposed resolution on *Foreign Relations of the United States* and that the drafting be done by Messrs. Carey and Cardozo. He suggested that Professor Cohen's substantive problem of access by scholars to U.N. documents be pursued by Mr. Carey and the committee. This arrangement was agreed. The motions to adopt the resolutions were then put to a vote and carried unanimously. The resolutions follow:

#### RESOLUTION ON THE PUBLICATION OF FOREIGN RELATIONS OF THE UNITED STATES

*The American Society of International Law* assembled at its 64th Annual Meeting in New York City on April 26, 1970,

*Reaffirming* its interest in the publication of the official documentary record of American diplomacy in the series *Foreign Relations of the United States*,

*Appreciating* the high standards of scholarship and editing maintained in the preparation of these volumes,

*But deeply concerned* that this series, essential to a proper understanding of past diplomacy and as a background for present international relations, is falling further and further behind currency,

*Resolves* to call upon the Department of State to give high priority to supplying adequate support in appropriations and personnel to check the increasing lag in the publication of the *Foreign Relations* volumes and to start a return toward publication nearer to currency,

*And resolves* to collaborate with other non-governmental, non-profit, educational, scholarly, and cultural organizations in urging the Congress and the Executive Branch to place higher priorities on matters of concern to the educational, scholarly, and cultural community of the nation.

RESOLUTION ON THE DOCUMENTATION OF THE U.N. COMMITTEE  
ON THE ELIMINATION OF RACIAL DISCRIMINATION

*The American Society of International Law*, assembled at its 64th Annual Meeting in April, 1970, whose theme is "The United Nations: Appraisal at 25 Years,"

*Reaffirming* its interest and that of its members in the scholarly study through documentation and otherwise of the legally significant activities of the United Nations and related international organizations, including the Committee on the Elimination of Racial Discrimination established under the International Convention on the Elimination of All Forms of Racial Discrimination,

*Desiring* to assume that, in the interests of scholarship, teaching, and the progressive development of international law, all possible documentation of such organizations be published as promptly and widely as possible,

*Expresses* the hope that the Committee on the Elimination of Racial Discrimination will give consideration to making its documentation known and available in accordance with the customary procedures for notation and distribution of documentation of United Nations bodies.

Mr. SCHACHTER read the slate of officers nominated by the Committee on Nominations:

*Honorary President:* Philip C. Jessup.

*President:* Harold D. Lasswell.

*Vice Presidents:* Richard A. Falk, Covey T. Oliver, William D. Rogers, Stephen M. Schwebel.

*Honorary Vice Presidents:* Dean G. Acheson, William W. Bishop, Jr., Herbert W. Briggs, Arthur H. Dean, Hardy C. Dillard, Charles G. Fenwick, Green H. Hackworth, James N. Hyde, Hans Kelsen, Charles E. Martin, Brunson, MacChesney, Myres S. McDougal, Oscar Schachter, John R. Stevenson, Robert R. Wilson, Quincy Wright.

*Members of the Executive Council to serve until 1973:* Richard R. Baxter, Adrian S. Fisher, John B. Howard, Monroe Leigh, John E. Leslie, Howard S. Levie, Peter D. Trocboff, Burns H. Weston.

Professor HAZARD moved that the Secretary cast a single ballot for the entire slate. The motion was seconded and passed unanimously. All of the nominees were elected by acclamation.

The newly elected president, HAROLD D. LASSWELL, took the chair and said how much he appreciated the ecumenical spirit. He said he looked

forward to continuing the good work so splendidly attended to by Mr. Schachter, and that he was particularly consoled to know that one of the great traditions enjoyed by the President was that of a guiding spirit. He said he was happy to know that the Honorary President, Philip C. Jessup, would be available for consultation on serious matters.

President LASSWELL then called on Mr. Schwebel to read the names proposed by the Executive Council for the Nominating Committee for 1970-71. Mr. Schwebel reported that the Council recommended the following Nominating Committee: Benjamin Forman (Chairman), Donald E. Claudy, Alona E. Evans, Isaac N. P. Stokes, and Howard J. Taubenfeld. It was moved and seconded that the Council's recommendation be accepted. The motion was carried.

Professor RICHARD R. BAXTER, who had been elected Editor-in-Chief of the *American Journal of International Law*, took the floor to report on discussions within the *Ad Hoc* Committee on the Governance of the Society and the discussions of this subject in the Executive Council. He said the committee was appointed in order to look into the operating procedures of the Society. He said the committee had met twice. At the first meeting a number of suggestions had been made, but it was felt that many of the matters discussed were outside the scope of the committee and these suggestions had been passed on to the proper committees. He said the second meeting discussed matters particularly concerned with procedures for elections of officers, the Executive Committee, the Board of Review and Development, and the Board of Editors of the *American Journal of International Law*.

Professor BAXTER said that, with regard to the Regulations on Membership in the Society, the Governance Committee questioned whether the provision denying student members the right to vote or hold office was consistent with the Constitution of the Society. The Executive Council on April 24, 1970, on the recommendation of the Governance Committee, had deleted the sentence, "Student members may not vote or hold office," from the Regulations. Student members may now vote.

Discussion of the voting rights of students, Professor BAXTER said, was part of a more general consideration of whether students should have representation on the Executive Council. It had been suggested that the President of the Association of Student International Law Societies should be present at meetings of the Executive Council. At the present he is invited to attend without the right to vote.

Professor BAXTER then took up the matter of election procedures of the Society. He said that, in keeping with the prevailing theme of openness, the Governance Committee recommended the adoption of a method by which the entire membership would have an opportunity to vote if elections were contested. One of the methods discussed was: 120 days before the Annual Meeting the Nominating Committee would present its report; 90 days before the Annual Meeting the Nominations would be reported to the Society, probably through the *Letter to Members*; 60 days before the Annual Meeting petitions for any additional nominations should be submitted;

30 days before the Annual Meeting a postal ballot should be furnished if there was a contest. At the Annual Meeting, the postal ballots would be included in the tabulation of votes.

Professor BAXTER said that, in selecting the Nominating Committee, the tendency had been to lean toward retired members of the Executive Council. While the committee made no recommendations calling for changes in the provisions of the Regulations respecting the Executive Committee, some members of the Governance Committee were of the view that in recent years there were too many past presidents within the membership of the Executive Committee and it should be more broadly representative of the Executive Council. The Committee recommended that the Board of Review and Development co-opt new members to serve full terms and to fill vacancies "with the consent of the Executive Council."

Professor BAXTER said that the recommendations of the Governance Committee with regard to the Board of Editors of the *American Journal of International Law* had been discussed by the Board at its recent meeting on April 23, 1970, and the different views and opinions will be further discussed, probably by a committee selected by the Board. One of the issues discussed concerned instituting a turnover of Board membership. Instead of the present life tenure (it amounts to that, even though there are annual elections by the Executive Council), it was suggested that the Board have 24 members with terms of 4 years, with 6 to be elected each year. In a desire to keep things flexible, the Committee on Governance believed there should be some rotation on the Board.

Professor BAXTER said that the Committee on Governance would like to have the organs concerned discuss the Committee's suggestions and then send their findings to the Committee. After a study of the comments, the Committee on Governance would submit its final report in time for action at the Annual Meeting in 1971. Professor BAXTER said that the Committee on Governance could then be discharged.

President LASSWELL said he thought the report of the Committee on Governance was important. It was a major step in opening up avenues that needed to be discussed and decided upon.

Mr. EDWARD GORDON suggested that thought should be given to keeping current the information on members that had been obtained in the survey.

Professor BAXTER said there were limitations to the Governance Committee's functions and not everything discussed by the committee related to "governance," but the Committee had routed ideas to the proper places.

Mr. SCHWEBEL noted that the Society in 1969 had conducted a detailed membership survey which provided much helpful information. A report on the survey by Richard W. Edwards, Jr., appeared in the April, 1970, issue of the *Journal*. He said the survey had been instrumental in opening up avenues for those members of the Society who were interested in taking a more active rôle in Society work. He pointed out that in the survey members were asked if they cared to serve on a study panel, and if so what subjects were of particular interest to them. As a result the chairmen of several panels have drawn on members who expressed interest in a sub-

ject. Thus in a number of cases members whom the chairmen would not have known about were now serving on the panels, although the bulk of the panels were composed of those who have demonstrated, by previous reputation, their ability to be productive on the panel.

Another question in the survey asked members if they were interested in reviewing books for the *Journal*, and if so what particular subjects in the field interested them. Approximately 900 positive answers were received, and the information has been supplied to Dr. Leo Gross, the Book Review Editor of the *Journal*. Dr. Gross has been making use of this information and in many cases invited members he would not have otherwise known of to review books for the *Journal*. Mr. SCHWEBEL said the membership application form has also been changed to receive more information from members when they join, and noted that it might well be further improved.

President LASSWELL said he had received a number of suggestions from various members. He emphasized that many of these suggestions would be acted upon and he wanted the members to feel free to send him their ideas, all of which would be given consideration.

Professor HAZARD spoke about the "practitioner panels" inaugurated at the 1970 Annual Meeting. He said approximately 70 persons attended each of the practitioner panels, while the other panels drew upwards of 300. He felt that when the Society met in New York it could get enough people for practitioner panels, but doubted that the Society could do so when meeting in other localities. He said a number of people thought Annual Meetings should be held from time to time outside of Washington, and he mentioned particularly Chicago and San Francisco. He thought some consideration should be given to the locale when deciding on the subject matter of the Annual Meeting's panel sessions. President Lasswell said he thought the attendance test was a good one.

Mr. DAVID M. GOODER said he thought the practitioner panels had excellent programs and those who had attended them felt that they were extremely worth while. He expressed the pleasure of the Section of International and Comparative Law of the American Bar Association in co-operating with the Society and hoped that the same co-operation could be continued in the future.

A member speaking from the floor said he felt that the private law area of international law was somewhat of a stepchild of the American Society of International Law. He said that the distinction between the two (private and public) areas was rapidly vanishing and that the tendency to equate the public law area with the more intellectual was not fair. He thought the term "practitioner" somewhat derogatory, and in view of the vanishing borderline, he hoped a less depreciatory term could be applied to these panels in the future.

Mr. PETER D. TROBOFF said that, since the Association of Student International Law Societies meets at the same time as the Society, the students cannot attend the Society's business meeting, and he asked that

some thought be given to rearranging these meetings so that students could participate more fully in all aspects of the Society's annual meeting.

Dr. EGON SCHWELB said he missed the Periodical Literature section which was formerly carried in the *Journal* and wished it could be reinstated.

Professor HAZARD said that the Periodical Literature section was discontinued after the *Index to Foreign Legal Periodicals* began publication. That index was systematically organized and covered more journals.

Mr. ALWYN V. FREEMAN said he would like to see the Periodical Literature section reinstated. Another member said that, if it were reinstated, he would prefer something more substantive like Elihu Lauterpacht's *International Law Reports*. Another speaker, who was a librarian, said he was quite familiar with the problems of listing literature and also of finding it. He felt that the literature as listed previously in the *Journal* was inadequate and he suggested that the Society might try to enlist some of the 900 members who expressed interest in reviewing books to digest pertinent periodical literature for inclusion in the *Journal*.

Professor CARDOZO said he thought some view should be expressed by the Society's membership about the optimal size and type of library desired in Tillar House. The library has become an unique institution in the Washington area. Many items in the library are not available elsewhere. He mentioned copies of court opinions in international law cases, briefs in international cases, and unpublished papers. If the library continues its present acquisition program, more money will be needed for more space and to provide more service. He thought that the Society might well seek to obtain the money needed through a separate grant for the library. He suggested that a committee be set up to look over the library and make suggestions for change or improvement. He said one step would be to ask the Council on Library Resources to make a survey of the library and state what they believe should be done.

President LASSWELL said the discussion indicated that there was concern about the various matters brought up and that he thought these concerns should be brought to the attention of the Executive Council. He then said if there were no other business the meeting could be adjourned.

The meeting adjourned at 11:30 a.m.

Sunday, April 26, 1970, at 10:30 a.m.

THE PHILIP C. JESSUP INTERNATIONAL LAW  
MOOT COURT COMPETITION

Astor Gallery, Waldorf-Astoria Hotel

Case concerning Claims arising out of the Nationalization of the  
United Petroleum Company by the Government of Amazonia

UNITED STATES OF AMERICA v. AMAZONIA

Judges of the Moot Court:

The Honorable PHILIP C. JESSUP, former Judge of the International Court  
of Justice.

Dr. F. V. GARCÍA-AMADOR, Director, Department of Legal Affairs, Or-  
ganization of American States.

Professor CLIVE PARRY, Cambridge University.

Finalists:

University of Miami

v.

University of Kentucky

ROBERT BOUCHARD

WOLFGANG E. NEUDORFER

ALVIN ENTIN

CARSON P. PORTER

JAMES GILBRIDE

SHERYL G. SNYDER

GEORGE HARPER

JUDY SCHMUKLER

The University of Miami team was declared the winner, and the Univer-  
sity of Kentucky team, the runner-up. The University of Miami also re-  
ceived the award for the best written memorials. Carson P. Porter of the  
University of Kentucky was declared the best oralist in the final round,  
and Alvin Entin of the University of Miami the best oralist in the semi-final  
rounds.

Other semi-finalists in the competition were:

Albany Law School

University of Paris (France)

University of California (Davis)

National University of Rosario

Columbia University

(Argentina)

Oxford University (England)

University of Texas



## ANNUAL DINNER

WALDORF-ASTORIA HOTEL

Saturday, April 25, 1970, at 7:30 p.m.

### TOASTMASTER

JOHN N. HAZARD

*Chairman, Committee on the Annual Meeting*

PRESENTATION BY AMBASSADOR EDVARD HAMBRO,  
*Permanent Representative of Norway to the United Nations,*  
of the Manley O. Hudson Medal awarded to

Professor PAUL GUGGENHEIM

Response by Ambassador BERNARD TURRETTINI,  
*Permanent Observer of Switzerland to the United Nations*

### SPEAKERS

OSCAR SCHACHTER

*President of the Society*

Honorable WILLIAM P. ROGERS

*Secretary of State*

### AFTER DINNER

Professor JOHN N. HAZARD. Honored guests, fellow members:

This is a gala occasion. We have broken with tradition to meet in New York to memorialize the 25th anniversary of the founding of the United Nations. We gather in the presence of the Secretary of State of the United States and his Lady, the Legal Adviser, the Permanent Representative of the United States to the United Nations, many Ambassadors, and past presidents of the Society.

Although we have broken with tradition on location of the annual meeting, we have preserved two other traditions: that the Program Chairman of the meeting shall preside tonight and that the President of the Society shall address it on this occasion.

Before we proceed to the speeches, we shall present the Manley O. Hudson Medal to the distinguished international lawyer chosen by our selection committee. For the presentation we have the Permanent Repre-

sentative of Norway to the United Nations, the Honorable Edvard I. Hambro. He is particularly suited to the task, for he personifies much in his presence. He is a member of the Society of long standing, one of its foreign members, and we salute them who now constitute nearly one fourth of our membership. He was a student of the recipient. He is beloved by all as indicated by the fact that he among all of the Ambassadors is known to most of us by his first name. I give you Ambassador Hambro.

Ambassador EDVARD I. HAMBRO:

The Manley O. Hudson Medal is one of the very highest honors in the whole field of international law all over the world. The recipients are, accordingly, of nearly frightening distinction! And what a galaxy they are. How proud we are to have known them, worked with them and been befriended by them! Manley Hudson was the first. A vigorous teacher, a prolific writer, a great and stimulating leader in research, a Judge of the Permanent Court of International Justice and a member of the International Law Commission. He was succeeded by the venerable Lord McNair, a writer and teacher of the greatest class, University Chancellor and President of the International Court of Justice.

The beloved figure of Judge Philip Jessup needs no comment in this assembly. Suffice it to say that he added new luster to the list of recipients. He was followed by Charles De Visscher of Belgium, a university man whose erudition is tempered by political wisdom and diplomatic understanding. He was a Member of the International Court of Justice as well as the Permanent Court. During the Second World War he showed his courage and determination as a leading figure in the Resistance.

And now the Society has awarded the Medal to the towering figure of Professor Paul Guggenheim from neutral Switzerland.

Paul Guggenheim has not been neglected in America. He is already an honorary Member of our Society. He is well known by international lawyers all over the world, but, of course, particularly in Europe, where he has been awarded honorary degrees at some of the most famous seats of learning. He writes his contributions in French or in German, only rarely in English or Italian. [The Statute of the International Court of Justice lays down the rule that "the teachings of the most highly qualified publicists of the various nations," can be used "as subsidiary means for the determination of rules of law."] Professor Guggenheim is today extensively quoted in this connection. His monumental textbook in international law both in French and in German is a classic. A new edition is in the process of being written. The first volume has already been published.

He has written a very great number of articles in learned periodicals, but when he had a cause to defend he also wrote in other periodicals and in the daily press. He has lectured several times at the Academy of International Law in The Hague and at the great universities in Europe. He has been one of the leading figures in the learned *Institut de Droit International*. But he has never lived in an ivory tower. Far from it. He has written widely on Swiss relations with the League of Nations and with

the United Nations. He has been President of the World Federation of United Nations Unions. He has been used by his own government and other governments, as consultant, as member of commissions and arbitration tribunals. He has been a leading advocate before international courts and he has been a Judge *ad hoc* at the International Court of Justice. From that period he jokingly refers to himself as an "Ex-excellency-ad-hoc." It is a very small thing, but it illustrates a wry sense of humor and a complete lack of pomposity.

But when all is said and the score is added up, it may still be said that he is perhaps greatest as a teacher. The lucidity of his thought is matched by the scope of his knowledge. The perceptive penetration of his mind is enriched by the constructive sweep of his imagination. All this is clear from his writing, but what a treat it was to be his pupil, to listen to his lectures, to participate in the debate in his seminars and to benefit from his wise counsel as a guiding spirit during the preparation of a doctor's thesis.

He has taught International Law in Geneva since 1928, first at the Graduate Institute of International Studies, and later also at the University of Geneva. He has imparted knowledge to young students for 30 years. And he has given them much more than knowledge. By his example and by his teaching he implanted in them the highest standards of integrity, of accuracy and of respect for the rule of law in international affairs. He has in Geneva inspired young people, and even some who were not so young, from all parts of the world. After the Second World War it may be that his most important task has been to participate in the education of young leaders from the Third World.

His colleagues and students from all over the world will rejoice with us today when this honor is conferred upon him.

I feel very honored that the American Society has conferred upon me the privilege to make this presentation in its name. And I am personally happy that I as one of his oldest students can join my voice to all the others in praise of a great master.

I beg to hand the medal and diploma to my old friend and fellow alumnus of the Great University of Geneva, Bernard Turrettini.

Professor HAZARD. Professor Guggenheim was unable to come to New York for the presentation, but we are fortunate that he has delegated to receive the medal the Permanent Observer of Switzerland to the United Nations. I give you Ambassador Bernard Turrettini.

Ambassador TURRETTINI. Mr. Secretary of State, Mr. Chairman, Mr. President, Excellencies, Ladies and Gentlemen:

Let me first say that Professor Guggenheim deeply regrets not to have been able to come to New York tonight to receive personally the Manley O. Hudson gold medal awarded to him by your Society. He was kind enough to ask me to represent him on this occasion.

It is an honor and a pleasure for me to be here tonight; an honor to be associated with so many distinguished personalities and a pleasure to have received for Professor Guggenheim this medal and diploma from the hands

of a very good friend and colleague, H. E. Ambassador Hambro, whose eloquent speech is a reflection of his great talent and also a dedication to the cause of international law.

Allow me now to read to you the allocution prepared by Professor Guggenheim:

STATEMENT BY PROFESSOR PAUL GUGGENHEIM

I wish in the first place, to express to you my deep emotion at having been awarded the Manley O. Hudson gold medal by the American Society of International Law.

It is particularly fitting that a representative of the Swiss Confederation should act for me today, considering that my writings are predominantly based on Swiss practice of international law. It was in the course of my research that I became aware of the close links existing between the United States and Switzerland in this field. The first author of a modern treatise on international law, Emer de Vattel of Neuchâtel, published in 1758 his fundamental work on "The Law of Nations or Principles of the Law of Nature Applied to the Conduct and Affairs of Nations and Sovereigns." This book was destined to enjoy a high reputation in American diplomacy. A few months before the American Declaration of Independence, Benjamin Franklin wrote to the Genevese Dumas who had sent him the third edition of Vattel's book, published in Amsterdam in 1775: "It (the book) comes to us in good season where the circumstances of a rising state make it necessary frequently to consult the law of nations." Vattel's work has become a major contribution by a Swiss writer to the elaboration of international law as it is practiced in the United States.

I should also like to mention the fact that numerous treaties concluded between our two countries have become *a model for international conventions between other states*. I have here in mind in the first place the memorable Convention of Friendship, Commerce and Extradition of 1850, which *was a pioneer treaty* in the economic field, *more particularly with regard to the most-favored-nation clause*, both in its conditional and unconditional form. Let me also recall that it was owing to the policy of our two countries in matters of pacific settlement of international disputes that we were able to submit to the International Court of Justice an important dispute arising out of the law of economic warfare, the *Interhandel* case, which was amicably settled.

Leaving now the field of our bilateral relations for more general considerations, I wish to concentrate on what is perhaps the greatest single American contribution to the science of international law, namely, the publication, ever since the second half of the 19th century, by the American Government, of Digests of International Law. These Digests constitute *magnificent working tools*, in fact, so magnificent that scholars of many countries, including my own, *have been emphasizing* the necessity of other governments following the American example. Thus, in 1947, my great compatriot, Professor Max Huber, speaking within the framework of the *Institut de Droit International*, raised the question of the usefulness of

national collections of documents on the pattern of the American Digests. Switzerland has followed the American example and we now expect to see in the course of this year the appearance of the first volume of a Swiss digest of international law covering the period of 1914 to 1939. We hope that this publication will be worthy of its American model.

I consider the honor which you have done me as rewarding an author who happens to share some ideas and conceptions with the four distinguished holders of the Manley O. Hudson gold medal who had preceded me. I venture to think that I have certain intellectual affinities with the very first of them, the unforgettable Judge Manley O. Hudson himself. I share with him the interest in legal problems of international organizations. I share with him the conviction *that we no longer can afford to isolate the study of the great fundamental problems of international law from those concerning the development of the international community*. Whatever the present weakness of its political foundation, that community certainly is moving from the primitive type of society, based on self-help, toward a more highly organized one. Only by a slow evolution can we reach the goal which is the creation of an international organization effectively able to maintain international peace and security and, as the United Nations Charter puts it, "to save succeeding generations from the scourge of war." In my own country, tendencies are now at work to establish closer ties with that political organization aiming at universality. My best wishes follow this trend towards a greater integration of the international community.

While continuing to be an optimist in the long term, I would be failing in judgment and, even more so, in honesty, if I were to pass over in silence the present deadlock in certain fields of international organization, *more particularly in that of judicial settlement of disputes*. After its promising start during the existence of the League of Nations, international judicial activity has now slowed down. The International Court of Justice is passing through a serious crisis. The present reluctance of states to submit disputes to the Court is, I think, due to the difficulty of agreeing on the contents of the rules of international law, that difficulty in turn resulting from the enlargement of the international community after the Second World War. Let us hope that this unwillingness will prove merely temporary.

States now forming the international community have not yet become sufficiently conscious of their common aspirations. But, whatever the differences in their moral or religious outlook, these common aspirations are eventually bound to prevail over divergent views. However, *a searching reconsideration of certain questions seems imperative*. Thus, it could be asked whether the present ways of administering justice are still appropriate and whether they should not be reinforced by mechanisms more akin to traditional arbitration and to certain special judicial agencies which had done such useful work after the first and the second world wars. I certainly do not suggest that this basis of judicial settlement, as it was established during the initial period of the Permanent Court, be aban-

doned. But I do think that the creation of an over-all system capable of enhancing the confidence of those states and governments which had not participated either in the establishment or in the initial activity of the Hague Court would deserve serious consideration.

Here is a common concern of all of us who are dedicated to the study and progress of International Law, as is the American Society of International Law which I wish wholeheartedly to congratulate on its so useful and fruitful activities. Let me conclude by reiterating my gratitude for the award of the Manley O. Hudson gold medal to a work, the weaknesses and shortcomings of which I am the first to acknowledge.

Professor HAZARD. You will have noted that there is one person missing from our head table whom we most certainly would have wished to be present, namely, the Secretary General of the United Nations, U Thant. He is in Geneva meeting with some of his aides, but he has sent the President of the Society a telegram to be read at this time, and I have the honor to present it to you.

Oscar Schachter  
President  
American Society of International Law  
Waldorf Astoria Hotel  
New York

On the occasion of the 64th Annual Meeting of the American Society of International Law to be held this year in New York in celebration of the twenty-fifth anniversary of the United Nations, I wish to convey my greetings and best wishes to an organization which, since 1907, has made a distinguished contribution to the progressive development of international law. The United Nations contributes to the growth of international law in multiple ways, just as international law contributes to the functioning of the United Nations in multiple ways. The strengthening of both international law and the United Nations are integral parts of the central problem of our time and of times to come: the creation and maintenance of peace with justice for all mankind. To that great challenge I am confident that your Society and its members throughout the world will continue to contribute.

U Thant  
Secretary General  
United Nations

Professor HAZARD. We turn now to the traditional speech of the President of the Society. Even if it were not traditional, we should have chosen Dr. Schachter for a talk this evening. He has been with the United Nations since its beginning, since San Francisco. Born, reared and educated in New York City, as few of us were, he personifies the career international public servant in the United Nations. For a great many years he was Director of the United Nations Legal Department after making his start in UNRRA. Currently he is Director of the United Nations Institute for Training and Research (UNITAR). We remember that part of the tradition of the President's speech when James Brown Scott was our President was that it was long. Dr. Schachter assures me that he has broken with

that part of our tradition, but he has retained the meat in a speech tailored to fit our times. I give you the President of the Society, Dr. Oscar Schachter.

PRESIDENT SCHACHTER. I much appreciate the Chairman's kind remarks. There are times when living in New York and working in the United Nations seem like double jeopardy but tonight they are a happy coincidence for the occasion.

When the Executive Council voted to meet in New York, for the first time in more than 60 years, several of us (especially the Society management) were understandably concerned over the risks and uncertainties of that change of venue. My first contribution was to introduce still another hazard—this one as Chairman. Professor Hazard lived up to my expectations, not his name. With remarkable dispatch he persuaded ten very eminent Society members to take on the task of organizing panels, efficiently giving each his marching orders. They in turn got a group of first-rate people to serve as panelists, all of whom merit our congratulations for the exceptionally good program of this year. It is one of the principal gratifications of being President of this Society to discover how many extremely busy and important people are ready to give their time and energy to its tasks. I would add to that the great pleasure of working with an extraordinarily able and dedicated Executive Director, Steve Schwebel, and a staff as hard-working and competent as any I have seen. I should like to include a special word in praise of Richard Edwards, the Assistant Executive Director, who is leaving the staff after several years of pioneering service in the newer fields of the Society's activities. Rich has not only been competent and hard-working; he has contributed ideas, criticism and proposals of great value. His departure is a loss to the Society and we wish him all the best in his new undertakings. This reminds me that in the good old days the President had to do without a staff. Our first President, Elihu Root, not only arranged the annual program, but he presided over all its meetings; the records show he even chose the menu for the banquet. But then he had good preparation, having previously served both as Secretary of State and Secretary of War before reaching the height of President of this Society. The distinguished speaker who will follow me might find this precedent interesting—I can assure him that the Society imposes no bar to its high office on account of previous condition of servitude.

## THE FUTURE OF THE UNITED NATIONS

*By Oscar Schachter*

I cannot say that my choice of subject—the future of the United Nations—is evidence of originality or inspiration. The fact is that John Hazard and his excellent program committee did so good a job that they managed to cover every important aspect of our theme, leaving it to me, so I gathered, merely to sum it all up and tell us where the United Nations is

heading. Futurology, after all, is in high season. At this very moment there are probably a hundred after-dinner prophets, forecasting away, relying on Herman Kahn or Jeanne Dixon or even the latest stockholders' report for the signals to the road ahead.

Incidentally, if you are going in for futurology, one of the things to avoid is to look back to see how the forecasters in the past have done; it is discouraging, especially when serious. There are the exceptions—H. G. Wells, for instance, hit a bull's eye in predicting the atomic bomb more than 50 years ago. The poets show up better than the scientists; a good example is the prediction of Robert Graves many years ago that the dirty language of his day would become the standard speech of the future. For a moment I was tempted to make that kind of forecast for the diplomatic intercourse of the future. Anyway, discouraged by the record of past prophecies, I turned to my wisest counselor, my wife, who only said, remember Ogden Nash's rule of thumb (You know how that goes: "Here's a good rule of thumb, too clever is dumb."). That's the kind of delphic advice that wives give to build up your confidence. But you need have no worry that this speech will be too clever. You will also be spared any prophecies of the world in the year 2000. For one thing, I lack the competence; and for another, those prophecies are becoming as boring as hippies chanting "hare krishna."

The real point of talking about the future of the United Nations is that it is a way of taking bearings on its present course and thinking about possible changes in direction. The twenty-fifth anniversary—our theme—makes that especially timely. In fact all of the "big" anniversaries of the United Nations—the 10th, the 20th, now the 25th—bring on this sort of speech-making: Where do we stand and where are we going? It is virtually a rule, if not a nervous habit, to take the "forward look." Incidentally, this is very different from wedding anniversaries: by the time we reach our silver anniversary, we are pretty sure where we are heading and have no great yen to talk about it.

I think we can expect the United Nations oratory on the 25th anniversary to contain a good deal more soul-searching than in prior celebrations. We have already had a foretaste of that in last year's General Assembly, some of it especially sharp (appropriately, Mr. Sharp, the Canadian Foreign Minister, took the lead). Even the Presidents of the General Assembly, those high dignitaries who traditionally have congratulated one and all, are no longer quite so congratulatory. Two years ago we heard some of the most trenchant criticism of the United Nations from a young and brilliant President from Guatemala. I shall not be astonished if the next President of the General Assembly, who can be as trenchant (and I should add, as charming) as anyone I know, will make a notable contribution in the same vein.

We cannot attribute all of this self-criticism to the anniversary spirit. That it occurs is, as our Marxist colleagues like to say, no accident. It reflects a widely-shared perception that the United Nations has become rather marginal, some might say irrelevant, to the important and central



concerns of governments and their peoples. Many have observed that the big Powers prefer to handle most, if not all, of their main problems by themselves, *tête-à-tête*. And the others—the majority, though by no means a silent majority—increasingly complain of the unreality and ineffectiveness of their majority rule. As I heard one representative to the United Nations recently put it: Of course we small Powers run the United Nations; we govern the territory between First Avenue and the East River and from 42nd to 48th Street; it is only the rest of the world that belongs to the major Powers. When Mr. Sharp said at the General Assembly that they were drowning in a sea of words he gave the cue for hundreds of similar comments. Everyone seems to feel, as one observer noted,<sup>1</sup> that the ratios are wrong: the ratio of words to action, of promises to performance, of staff and budget to the resources spent on arms. Even the hopes placed on the non-talking side of the United Nations—what Dag Hammarskjöld called executive action—are muted, and more is heard today of the complications of international bureaucracy, “unwieldy and slow, like some prehistoric monster” (to quote Sir Robert Jackson).<sup>2</sup> It is sensed that outside of the enclave there is popular apathy. Delegates comment on the indifference of youth, especially idealistic youth, toward the United Nations. That has been as disturbing as it is unexpected. The press is regularly taken to task for its poor coverage, though obviously that is more of an effect than a cause of reduced hopes and interest.

All of this is profoundly disquieting to those of us who are convinced of the necessity of effective international institutions to cope with the tensions and disorders of our time. Yet this very concern, reasonable and well founded as it is, can, if carried too far, be a cause of muddled and confused thought. Santayana once observed that the Arabian Nights went together with Arabian days. (What he meant of course was that wishful fantasies proliferate when real life seems dreary and hopeless.) It is natural, perhaps inevitable, that people will think that great dangers will bring about miracles of transformation. What seems necessary will be seen as possible or, even as if wishing can do it, as probable. It is not so long ago that the advent of the nuclear bomb was seen as bringing about world government. Today it is the population explosion or pollution which is the favored danger to give rise to hopes of a new structure of world order.

But just because our hopes lead us in that direction, we need a measure of skepticism or, better, a clearer head about the world as it actually is and where it seems to be going. Without that, we run into the same old cycle of earnest exhortation, blueprints for bright new machinery, condemnation of the powers that be, usually followed by disillusion and apathy. No one here will of course feel that this admonition applies to him. I can only say that when I looked through contemporary writings on inter-

<sup>1</sup> H. G. Nicholas, “The United Nations as a Political Institution,” 25 *International Journal* (Canada) 271 (1970).

<sup>2</sup> In: *A Study of the Capacity of the United Nations Development System* (DP/5, Vol. I, p. iii (1970)).

national affairs (not excluding international law) I was struck by the frequency of an apocalyptic note, on the one hand, and the proposals for a "quick fix," on the other. That tendency can result in a feeling of deep pessimism precisely because they make our future depend on a radical and sudden transformation of the international system and deep-seated human attitudes.

Actually I for one do not expect either the apocalypse or a quick fix in the next decade. I do not count on any of the great threats—population, pollution or nuclear proliferation—to modify radically the existing international system. The nation-state is not going to wither away in the next two decades. Indeed my expectation is that nationalism will continue to grow and the nation-state will be even more idealized than it is today. That expectation, however, does not cause me great despair nor does it make me pessimistic about the future rôle and utility of international organization.

One reason for this not-so-pessimistic conclusion is the clear evidence that the governments are increasingly conscious of their dependence on others and of the limitations of action they can take in isolation. To some of you this may seem a truism. To others it may appear to be contradicted by the resurgent nationalism and even the autarchic tendencies of many governments. One of the distinguished political scientists in this Society, Karl Deutsch of Harvard, has concluded on the basis of a survey of élite opinion in Europe that nationalist tendencies are in the ascendancy due to higher national cohesiveness and that they counteract the factors of interdependence.<sup>3</sup> However, my reading of the situation is somewhat different from that of Professor Deutsch. It seems to me that the governments of most countries, including the large and prosperous nations, are being made almost continuously aware of their relative impotence, in the sense that they cannot adequately control events external to them even when these events could have substantial, perhaps catastrophic, effects on them. This has been dramatically demonstrated to the super-Powers. It is a red thread that runs through the maze of problems on arms and security policy. For most countries, their lack of control over matters of concern is probably most evident and unsettling in the economic sphere. There is hardly a government in the world today that is not keenly aware that domestic wages and incomes can be and often are critically affected by external monetary and trade factors. Not long ago it was made plain to one of the proudest of governments that the cost of going it alone in economic matters may be too steep a price to pay for national glory.

When we see it this way, it is perhaps not as paradoxical as it may seem that strong nationalist drives have gripped many countries (and not merely the newly independent states which are supposedly especially self-conscious of their sovereignty). It is after all not all that strange that an acute awareness of dependence can generate intense demands for a greater meas-

<sup>3</sup> Deutsch and others, *France, Germany and the Western Alliance: A Study of Elite Attitudes on European Integration and World Politics* (N.Y., 1967). See also Deutsch, *An Analysis of International Relations* (Prentice-Hall, 1968).

ure of independence. Those demands, natural enough, are stimulated and strengthened by a specific feature of this period which adds a new dimension—namely, the enormously increased pressures on modern states to meet the rising expectations of their peoples. The great struggles of our day—the demands for equality and social justice, for greater economic security, for a sense of belonging and participation—give rise to these pressures and for that reason intensify nationalist tendencies. Thus it is not strange that the revolutionary and reformist movements in the underdeveloped world, and in many of the industrialized countries as well, rally to the banner of sovereignty and call for unilateral extensions of national control. We do not have to look very far for an example. From their vantage point that nationalist response does not seem unreasonable, especially since their “interdependence” is actually felt as a dependence on a larger foreign Power.

What does this have to do with my theme—“the future of the United Nations”? I suggest it takes us to the very heart of the matter. For it seems to me that these two, apparently contradictory, influences in most modern states, namely, the objective factors of interdependence, and the subjective demand for national sovereignty, give rise to the major issues that will be faced by the international community in the most vital areas: security, economics, environment. For that reason, they pose a challenge to the collective body and, I might say, to all of us, to think through these issues and come up with ideas and innovations to meet that challenge.

Let me begin with a few modest and tentative suggestions. First, I would say, is the need to discard some intellectual impedimenta. For example, we should rid ourselves of the idea that these are issues that can be solved by public relations images. The fact that astronauts have seen the globe without national boundaries will have slight effect on the actual demands for national sovereignty or on the factors that underlie those demands. And while the image of the “space-ship earth” may have some psychological effect, its political impact should not be exaggerated.

We may also have to rid ourselves of some ingrained lawyers’ assumptions. It is perhaps obvious to this sophisticated audience, though not to others, that we do not get far in settling these issues through a formula on jurisdiction, whether we call it “domestic” as against “international” or “exclusive” versus “inclusive.” (Some of you may remember that a Spanish delegate at the United Nations once referred to the domestic jurisdiction clause of the Charter as the chastity belt of the United Nations. Someone observed that it was not more effective than chastity belts had generally been.) The fact is that, as I have already indicated, our highly interdependent, interacting world has deprived “domestic” of any definite objective meaning, even if, in some cases, adding to its psychological force.

While I am wary of deceptive formulas and of image-making, I do not believe one can adequately cope with the complex set of issues I have described solely through the usual *ad hoc*, meeting-the-problem-as-it-arises method that some dignify by calling pragmatism. So many new factors have intervened, so many tendencies are dimly perceived or hardly under-

stood that governments cannot today adequately determine their national interest just by taking each problem as it comes up. I should perhaps say the national interest as "rightly understood," a phrase that can be found in the writings of the founding fathers of this Republic when they spoke of self-interest. To achieve the right understanding of national interest it will, to say the least, do no harm if governments opened themselves to a flow of ideas and criticism from the outside. For this purpose the United Nations may be an unparalleled resource, for it can (as it has in many cases) provide the kind of multinational, multi-partisan confrontations that are required to understand national interests in the complex interrelationships of our present system.

What I should like to see are much greater opportunities for United Nations delegates to engage in genuinely deliberative and reflective discussion, among themselves, and also with others who are not as much tied to particular national preoccupations. (I might say that UNITAR, with which I am associated, has had some reasonably promising experiments of that kind.) One might try to build up the habit, in appropriate forums, of governments expressing their intentions to take future action in matters of international concern and in that way to receive the reactions of others before final decisions are reached. Measures affecting economic relations or contemplated action with environmental consequences would then be communicated to international organs for their comments and brought to the notice of states everywhere. The fact that we are in so fast-moving a world should not be an obstacle; it should rather underscore the importance of such efforts to fix reasonable expectations in advance of action that would have repercussions beyond the state taking such action.

Since these last suggestions may only appeal to the intellectuals in the audience, let me turn to a constitutional matter: the problem of particular interests and global majorities. We now have an uneasy relationship between the conception of an over-all "parliament of man" concerned with global matters and the reality of many special interest groupings made up of those directly responsible for and affected by particular areas or activities. These special interest groups are sometimes viewed as dubious by the global body, as being not quite as internationally public-spirited as a universal organ. Yet clearly it makes sense to have organizations of special interest groups precisely because they serve to meet the legitimate desire of governments to have a greater voice in those matters affecting them most closely.

I realize that some governments will object to proliferation of multinational institutions as though it were in itself an evil, but it seems to me that that objection (so dear to the budget-makers) should be closely examined. A strong case can be made that there is actually a paucity of multinational instrumentalities to meet the continuing problems that require them. It is in part because of this institutional poverty that the global bodies of the United Nations are now overloaded. Their delegations often cannot cope with the numerous and complicated special problems with the result that, too frequently, rhetoric takes the place of action

or adequate deliberation. In the end, there is a sense of futility and waste. There is, moreover, the consequence that countries with a direct stake in a situation often feel that their interests are being settled by governments which are remote and not directly concerned. The advantages of special interest organizations are evident in the case of river basin development organizations (such as that for the Lower Mekong and the Plata basin) which have been established by those directly concerned. Similar considerations suggest new institutions for "ecosystems" (*e.g.*, Arctic) or special functional conglomerations such as multinational corporations.

Such institutional pluralism need not and should not mean an ouster of global organs. Instead of remaining outside the United Nations system, the special-purpose bodies should be brought into more effective working relationships with the universal organs. It would be useful to devise mechanisms more appropriate than parliamentary procedures to express the global interest vis-à-vis the narrower specialized groups. Perhaps organs of a quasi-judicial character, utilizing hearing procedures, could be established as subsidiary bodies of the General Assembly or other global bodies to maintain a check on the "special interest" instrumentalities. Their objective would be to provide some assurance that the rights of minority Members would not be prejudiced and that the interests of non-Members would be given reasonable protection in the special-interest bodies. The whole international constitutional system needs to be re-examined to provide for new forms and new relationships. The present categories of "subsidiary organ," "specialized agency" and non-U.N. organizations are inadequate for the diverse and complicated growth which is now taking place.

I would mention, too, that the organizational pluralism I envisage should have room for, and should encourage, new structures that do not follow the conventional pattern of international organization. We may well see a network of multinational public enterprises eventually grow up for the collective management of those resources of the earth regarded as common assets. Such enterprises would more sensibly follow the pattern of operating companies than the model of diplomatic conferences which still governs much of international organization. A quite different example of a multinational special-purpose enterprise that requires new structural forms is the international university that U Thant, Harold Lasswell and others have called for. A global network of faculties, institutes and academies needs to be devised to cover the variety of interests and requirements. To turn to still another example, there are the proposals for world-wide technological "ombudsmen" to alert us to the dangers and liabilities of new technologies. They may require new organizational forms in order to attract the scientific expertise and other specialized talent required to cope with problems not easily dealt with by international administration. Simply adding a new Division to the Secretariat will not serve the purpose. In sum, our needs are many and our international tools are far too few.

I do not see that the pluralism I have suggested would weaken or de-

tract from the vitality of the United Nations. On the contrary, in my favorite crystal ball, I see the world organization resting more firmly on the underpinnings of the many and diverse multinational instrumentalities that are needed to serve nation-states mutually dependent on each other. I see the United Nations strengthened because these new instrumentalities would more adequately meet the legitimate demands of states directly concerned and for that reason they would reduce the sense of dependency and impotence on which isolationism feeds. It would be my hope the global organs of the United Nations might then serve to harmonize the diverse instrumentalities; the United Nations would act as the conductor of the orchestra leaving it to others to be violinists, tuba players and drummers.

I would expect that, in consequence of expanded multinational activities, there will be an expansion of new law, spelling out rights and obligations on a more concrete and practical level than we have had up to now. For as we lawyers know, it is in the interstices of procedure that substantive law develops. In that not-too-distant future I also anticipate there will be far more challenging opportunities than at present for individuals of talent and vigor to serve in the international public service and to have associated with them on a much greater scale than today the professional communities of scientists, lawyers and managers. I suspect that such linkages on an individual and personal level would prove more important than formal relations in strengthening the feeling of nations that they are full participants in the burgeoning multinational institutions that they need.

Only a raving optimist could think that the ideas suggested will bring in that brave new world in which power and politics will be completely subordinated to international authority. Of course I do not expect that. What I would foresee is that a strategy on the lines suggested—many-sided, flexible and energetic—could enable governments to break the cycle of dependence and self-defeating nationalism I have described and to come closer to a clearer, more realistic conception of their national interest. That would be no small step forward.

Professor HAZARD. To introduce the Secretary of State of the United States we have chosen our own beloved Honorary President, Judge Philip C. Jessup. He has just completed his term as Judge of the International Court of Justice and returned to us. We are much honored that he has been willing to accept election as Honorary President of the Society.

Judge PHILIP C. JESSUP. Mr. Secretary, you face a sympathetic audience. A society of lawyers must sympathize with a fellow member of the Bar who is called to high station where he must solve intricate legal problems of vast importance to our country and to the world.

Your audience in this American Society of International Law rejoices in the fact that one of its former Presidents—Jack Stevenson—is your Legal Adviser. We feel that we have in common the fact that when opportunity offered, both the Society and you chose the best man for the job. If it was his advice which led to your acceptance of the Society's invitation to come here to speak tonight, we are again in his debt as we are in yours.

One of your distinguished predecessors was sworn in as Secretary of State on a hot July day in 1905, before Washington was air-conditioned. This predecessor, like you, was a lawyer. Like you, he had already served in another Cabinet position although not the same one as yours. Like you—and this is important—he was a Republican. He wrote to his wife, Mrs. Elihu Root: “I have just taken the oath as Secretary of State. It is very hot but as I have kept to Carlsbad regime during the past week & have smoked only one cigar a day, I am not at all discommoded or pulled down.”

We do not interrogate you about your smoking of cigars (in those 1905 days one could smoke real Havanas!) but we hope you too have not been “discommoded or pulled down” by your onerous duties.

As we think of the strains of today, it is perhaps comforting to recall that when in 1770 Edmund Burke published his tract entitled “Thoughts on the Cause of the Present Discontent,” he wrote:

To complain of the age we live in, to murmur at the present possessors of power, to lament the past, to conceive extravagant hopes of the future, are the common dispositions of the greatest part of mankind. . . .

Ladies and Gentlemen, I have the honor to introduce the Secretary of State.

## THE RULE OF LAW AND THE SETTLEMENT OF INTERNATIONAL DISPUTES

*By the Honorable William P. Rogers  
Secretary of State*

Modern international law developed in an age when war was still the sport of kings. Today nations have the power to annihilate each other. This bleak fact underscores our vital need to search for alternatives to force or the threat of force as a means of settling disputes between nations.

A major objective of the Nixon Administration is to further the development of a stable and progressive world community based on an accepted system of international law.

Outside the legal community—and within it, too, for that matter—there are those who are skeptical about the reality and value of international law. They ask if it is really law since there is no effective provision for enforcement. They question whether nations, notoriously unwilling to bow to processes of adjudication, will ever accept a broad international legal system. They refer to the failure of states to use the International Court of Justice, and point out that it does not now have a single pending case on its docket.

Candor requires us to acknowledge that for the immediate future no international legal order, however restructured, is likely to solve many of the major disputes involving issues of war and peace.

And we must agree, with sadness, with the allegation concerning the International Court of Justice.

There has been a certain euphoria in our approach to international law. Our rhetoric often has been out of touch with reality. In our zest to take giant steps we have failed to take the confidence-building smaller steps which are necessary to move from routine, and less significant international cases, to more important and major ones.

However, we need not exaggerate our lost opportunities. There has been considerable progress in some areas. I do not have to emphasize to this audience the important rôle that international law plays in our international relations. Territorial boundaries are largely respected, diplomacy functions effectively, and in such activities as shipping, international air travel, foreign trade and investment, etc., international law plays a vital rôle.

It is clear, however, that there is much to be done to advance the cause of international law. With that goal in mind, I would like to make these three recommendations:

First, we should try to breathe new life into the neglected—in fact moribund—International Court of Justice.

Second, we should encourage greater use of multilateral lawmaking treaties.

Third, nations should live up to their obligations under international agreements.

Why is the Court important?

International law requires more than treaties and agreements to fulfill its promise. A judicial system is needed to support it.

Regrettably, as I have indicated, the International Court of Justice has become increasingly inactive in recent years. Why is this so?

The basic problem is the reluctance of states to refer international disputes to the Court. States have not been willing to accept the idea of going to the Court on a regular basis, expecting to win some cases and lose others. If the legal adviser of the foreign ministry is not confident of victory, he recommends against litigation.

Refusal to submit a case to the Court unless it is virtually a sure win has a short-term advantage from a national vantage point. But what nations so far have failed to grasp or to accept is the long-range gain, from an international vantage point, of establishing a system of settling international disputes by legal methods.

In 1946 the United States accepted jurisdiction of the International Court only in cases which excluded matters of domestic jurisdiction “as determined by the United States of America.” This gave the United States the right in each case to determine whether the Court had jurisdiction or not.

It is not generally known, however, that since 1946 we have committed ourselves, without reservation, to the jurisdiction of the Court with respect to disputes arising under some twenty multilateral treaties. These include, among others, the constitutions of a number of international organizations as well as the Japanese Peace Treaty. Similarly, we have committed our-



selves to the Court's jurisdiction over more than twenty bilateral agreements, principally commercial treaties.

But this is far too few when you realize that we have become a party to 106 multilateral and 125 bilateral treaties since 1946.

This Administration is committed to strengthening the rôle of international adjudication in the settlement of international disputes. We are taking specific steps to carry out this policy.

In the future the Department of State will examine every treaty we negotiate with a view to accepting, wherever appropriate, the jurisdiction of the International Court of Justice with respect to disputes arising under the treaty. In a treaty in which we or the other government cannot accept the Court's jurisdiction, we will urge the inclusion of other appropriate dispute-settlement provisions.

In addition, I have directed that wherever disputes arise with other countries we give active and favorable consideration to the possibility of submitting them to the International Court of Justice. Recently we asked the Canadian Government to join us in submitting to the Court the differences arising from Canada's intention to establish pollution and exclusive fisheries zones more than 12 miles from her coast. We are presently exploring the possibility of submitting several other disputes to the Court.

In this connection we can recall the early experience of our own Federal courts, which attracted legal business through increasing popular confidence in their handling of what at first were principally routine matters. We can also learn from the experience of other countries which have found the Court useful in resolving small disputes. For example, France and the United Kingdom submitted a case relating to two small islands. And Belgium and The Netherlands litigated before the Court the issue of sovereignty over a few small enclaves. In these and other cases involving relatively minor issues the Court has been able to develop important legal principles.

Advisory opinions are also important in building confidence. It is a disappointing fact that in the last eight years no international organization has submitted a request to the Court for an advisory opinion, although clearly there has been no dearth of problems.

If changes in the Statute of the Court are given serious consideration, I would like to suggest two ways in which its advisory jurisdiction might be expanded:

First, additional international organizations could be authorized to request advisory opinions. It would be particularly useful to give regional organizations access to the Court.

Second, serious consideration should be given to authorizing disputing states to ask the Court for an advisory opinion when they prefer that approach to a binding decision.

It is, of course, also important for states to accept and respect the pronouncements of the Court. In one important case when the Court made a courageous ruling—that United Nations Members were obliged under Article 17 of the Charter to pay for U.N. peacekeeping activities assessed

by the General Assembly—its implementation was blocked by certain states for political reasons.

However, we should recognize that the Court is at least partly to blame for its state of neglect. There is no doubt that its reputation was damaged by its decision in the South-West Africa case—that the complainants had no standing to present their claims—after more than five years of proceedings. A similar decision early this year in the Barcelona Traction case, after more than seven years, has further eroded confidence in the Court.

I hope that the Court will take steps to prevent such delays in the future by deciding preliminary questions promptly without joining them to the merits of a dispute. The Court also should be willing to impose reasonable time limits on parties and their counsel.

I have requested my Legal Adviser, Mr. John Stevenson, to begin consultations with other governments to consider recommendations for possible improvements in the Court's procedures. The following suggestions may be worthy of consideration:

- Greater use might be made of the chambers of the Court in an effort to relieve apprehensions about submitting disputes to the 15-judge tribunal sitting *en banc*.

- The chambers could meet outside The Hague in order to make the Court more visible in other regions of the world.

- Regional chambers could be established to make the Court more attractive to Latin American, Asian, and African states in disputes with other states in the same region.

- Summary proceedings might be used more often, and the length of pleadings and oral arguments might be appropriately limited.

Turning now to my second point, I believe that we should make greater use of multilateral lawmaking treaties.

The need to develop new international law by the treaty or international agreement route has become more urgent because of advances in technology. To cite one example, the rapid growth of commercial aviation has confronted us with a dangerous international problem we never had before: airplane hijacking.

The United States has taken several steps to deal with this problem. We recently ratified the Tokyo Convention on Offenses Committed Aboard Aircraft. We are actively participating in the International Civil Aviation Organization's efforts to draft a convention which would require the state where a hijacked aircraft lands either to punish the hijacker or to extradite him to a state where he can be punished.

Another major area urgently requiring multilateral treaties is the oceans, which cover 70 percent of the globe.

We are supporting measures at the United Nations for the preparation and conclusion of two supplementary Law of the Sea Conventions. One would set the breadth of the territorial sea at 12 miles, with guaranteed rights of free transit through and over international straits and carefully defined preferential fishing rights for coastal states in the high seas adja-

cent to their territorial seas. The other would define the outer limit of coastal states' sovereign rights to exploit the natural resources of the seabed and would establish an international regime governing exploitation of seabed resources beyond that limit.

In addition, yesterday, we signed at the United Nations Headquarters here in New York the Convention on the Law of Treaties adopted at Vienna a year ago. This treaty provides the basic "contract law" for treaty-making, interpretation, and termination. It is a treaty of major importance.

In suggesting the need for increased efforts to conclude multilateral treaties developing and clarifying international law, I do not want to deprecate customary international law. We all recognize in the day-to-day conduct of our foreign relations the importance of observing the rules of custom which nations have accepted as appropriate rules for international conduct. They represent the accommodation and balancing of interests which states have found it in their reciprocal interests to make. Thus they are a very useful means of avoiding international conflict.

However, like our common law, the rules of customary international law are frequently somewhat vague. In certain areas, particularly where international standards for the protection of aliens' property rights are involved, they are under attack in the developing countries. These countries argue that they did not participate in the development of these customary rules and therefore should not be bound by them. While we may not accept this line of argument, we must take into account the threat it presents to the stability of the international legal system.

Multilateral lawmaking treaties have advantages over customary international law. They make the legal rules more precise. They bring the newly independent countries into the development and clarification of international law. And they should increase the willingness of states to submit disputes to international judicial tribunals.

The third point which needs to be stressed is that nations must live up to their obligations under international agreements. International law, like any other set of rules, can function effectively only in a climate of respect and observance.

It is important for states to respect the international agreements they enter into on economic and technical matters. But it is of much greater importance for them to honor their commitments under those agreements involving international peace and security.

In Laos and Cambodia—the focus of recent international concern—the cessation of all hostilities and respect for territorial integrity and neutrality are matters of international agreement.

North Viet-Nam committed itself in Laos in 1954 to a "complete cessation of all hostilities," withdrawal, and a prohibition on introducing "any reinforcement of troops or military personnel." In 1962 it undertook similar and even more substantial obligations. They included obligations not to "commit or participate in any way in any act" which might impair "directly or indirectly" the sovereignty or neutrality of Laos and not to use

the territory of Laos for "interference in the internal affairs of other countries."

In Cambodia, North Viet-Nam committed itself in 1954 to a "complete cessation of all hostilities" to be enforced by its commanders "for all troops and personnel of the land, naval and air forces" under its control. It also committed itself to the withdrawal from Cambodia of "combatant formations of all types which have entered the territory of Cambodia."

With those international agreements as a backdrop, what are the facts?

In Laos over 65,000 regular North Vietnamese troops have invaded and now occupy large portions of Laotian territory. About 40,000 are in the southern part of the country, along the Ho Chi Minh Trail. More than 25,000 North Vietnamese troops are in northern Laos. On February 12 this force launched the current offensive which has led to the increased anxieties. Prime Minister Souvanna Phouma has strongly objected and condemned this invasion of his country by the North Vietnamese—to no avail.

In Cambodia, as in Laos, North Viet-Nam has long been occupying territory in direct violation of its repeated treaty commitments to respect the country's neutrality. More than 40,000 North Vietnamese and Viet Cong troops have invaded and now occupy Cambodia. In Cambodia, as in Laos, Hanoi is using armed force against a state where it has no legitimate rights and against a people with whom it has no ethnic affinity. Both Prince Sihanouk and his successor, Prime Minister Lon Nol, agree that this is the case.

A more explicit and unprovoked violation of the fundamental provisions of the Charter of the United Nations and of additional specific international obligations to respect the territory of others could hardly be imagined.

Seven nations endorsed the Geneva Accords of 1954 upholding the independence and neutrality of Cambodia and Laos. Fourteen nations undertook further obligations in 1962 to hold consultations in the event of a violation, or threat of violation, of the neutrality of Laos. The violations of those accords by North Viet-Nam in Laos and Cambodia are explicit, uncontested, open and without any shred of international sanction. Is it not time for nations which are signatories to international agreements actively to support them? Should not the international community itself more actively look for ways to shoulder its responsibilities?

Article 4 of the 1962 Agreement on Laos is explicit in requiring the signatories to "consult" on measures to ensure observance of the agreement in event of a violation or even the threat of a violation. The Soviet Union, whose Foreign Minister is a Co-Chairman of the Geneva Conference, has a particular responsibility "to exercise supervision over observance" of the agreement. Yet, except for a proposal by the Soviet United Nations Representative, Mr. Malik, about reconvening the Geneva Conference machinery—a proposal from which the Soviet Union has been steadily backpedaling since—the Soviet attitude has been negative toward exercise of its treaty responsibilities.

The flouting of international agreements which were freely entered into by Hanoi is not just a problem for the parties to the agreements. It is a problem for the world community. If states fail to honor their obligations solemnly agreed to, then the rôle of law in the settlement of international disputes becomes minimal and nations have no recourse but to resort to force to protect their sovereignty and territorial integrity.

In addition to the obligations of signatories to the 1954 Accords, there are responsibilities of a more practical sort which concern particularly the states of the area. In this regard it is encouraging to note that the Foreign Ministers of such nations as Indonesia, Thailand, and Japan are initiating consultations to determine what action they can take in the international community to protect and restore the independence and neutrality of Cambodia.

In conclusion, the suggestions I have made today—to revive the International Court of Justice, to encourage more multilateral lawmaking treaties, and to insist on observance of international agreements—reflect my conviction that it is both necessary and possible to increase the rôle of international law in the settlement of disputes.

We must take steps which will build international confidence in international law. Mankind eventually must become wise enough to settle disputes in peace and justice under law. That is your goal—that is the goal of your Government.

Professor HAZARD. We conclude our Sixty-Fourth Annual Meeting. May I close in thanking the Secretary of State on your behalf for his stimulating and inspiring message.

## APPENDIX

### MEMBERS EMERITI

PHANOR J. EDER. Member since July 12, 1920.  
WALLACE MCCLURE. Member since September 20, 1920.  
G. BERNARD NOBLE. Member since November 1, 1920.

### *In Memoriam*

KENNETH S. CARLSTON, Champaign, Illinois, member since 1944, died Sept. 16, 1969.  
MARCUS DALY, Lincroft, New Jersey, member since 1956, died July 25, 1969.  
ROYDEN J. DANGERFIELD, Champaign, Illinois, member since 1927, died 1969.  
RALPH H. DWAN, Washington, D. C., member since 1954, died August 27, 1969.  
ARCHIBALD R. GRAUSTEIN, New York City, member since 1917, emeritus 1967, died Sept. 15, 1969.  
FREMONT A. HIGGINS, Los Angeles, California, member since 1945, died 1969.  
WILLIAM R. JARNAGIN, Beverly Hills, California, member since 1956, died March 13, 1969.  
Rev. WILLIAM L. LUCEY, S.J., Worcester, Massachusetts, member since 1947, died 1970.  
E. RUSSELL LUTZ, Washington, D. C., member since 1927, died January 12, 1970.  
P. D. MAKTOS, Washington, D. C., member since 1963, died January 14, 1970.  
JOHN F. McELROY, New York City, member since 1965, died 1969.  
J. F. McMAHON, Oxford, England, member since 1968, died April 14, 1969.  
AMOS J. PEASLEE, Clarksboro, New Jersey, member since 1921, life member since 1922, died August 29, 1969.  
ULFICH PRALLE, Einbeck, Germany, student member since 1963, died January 6, 1969.  
GERALD G. SCHULSINGER, Washington, D. C., member since 1957, died August 31, 1969.  
MANFRED SIMON, Seattle, Washington, member since 1960, died January 1, 1970.  
THEODORE H. THIESING, New York City, member since 1919, emeritus, 1969, died April 8, 1970.  
MILTON P. THOMPSON, Washington, D. C., student member since 1968, died 1970.  
KATHERINE WISEMAN, San Antonio, Texas, member since 1945, died September, 1968.  
MARION L. WOLTMANN, New York City, member since 1967, died June 16, 1969.

## REPORT OF THE COMMITTEE ON PUBLICATIONS OF THE DEPARTMENT OF STATE AND THE UNITED NATIONS

### DEPARTMENT OF STATE PUBLICATIONS

The volumes of *Foreign Relations of the United States* continue to supply basic documentation for the understanding of the historical development of American diplomacy by giving the official documentary record on a year-by-year basis. Much material of interest from the standpoint of international law is included. The value of this series would be greatly increased, however, were the volumes for each year released with a shorter gap between the currency of the documents and their publication.

For a considerable time the *Foreign Relations* volumes usually were published about 15 years after the currency of the documents they contained. This gap gradually lengthened to 20 years. In reply to urging from the Department's Advisory Committee on *Foreign Relations*, the then Secretary of State, Dean Rusk, in December, 1962, gave assurance that an effort would be made to keep the volumes from falling further behind. The gap has continued to lengthen, however, and the volumes being released this year are those for 1946, 24 years behind currency.

Nine volumes of *Foreign Relations* were scheduled for publication in fiscal year 1970, ending June 30. Of these six have already been released and three more are in page proof.

The volumes for 1945 have now all been published. The three released during the present fiscal year were:

1945, Volume VI, Eastern Europe; Soviet Union

1945, Volume VII, Far East; China

1945, Volume IX, American Republics

Of the eleven volumes for 1946, one was released in fiscal year 1969: Volume V, British Commonwealth, Europe. The following three 1946 volumes have been released in fiscal year 1970:

Volume VI, Eastern Europe; Soviet Union

Volume VII, Near East and Africa

Volume XI, American Republics

Three more volumes for 1946, scheduled for release this fiscal year, are in page proof:

Volume II, Council of Foreign Ministers

Volume III, Paris Peace Conference, Proceedings

Volume IV, Paris Peace Conference, Documents

Nine *Foreign Relations* volumes are scheduled for publication in fiscal year 1971. Four of these are likely to be released during that period. The fate of the remaining five is very doubtful.

In addition to those scheduled for publication this fiscal year, there are four more volumes to come for 1946. These are:

Volume I, General, United Nations

Volume VIII, Far East

Volume IX, China

Volume X, China

The China volumes for 1946 are of special significance in that they contain records of the Marshall Mission covering extensive discussions both with officials of the Republic of China and with leaders of the Chinese Communists in futile efforts to obtain a peaceful settlement of the conflict in China by negotiations.

The other volumes scheduled for publication in fiscal year 1971 include four of the eight volumes which have been compiled for 1947. There is also scheduled a wartime conference volume: *Conferences at Washington and Quebec, 1943*. One additional volume in this conference series will remain to be published, that documenting the Conference at Quebec, 1944.

Compilation of the record for 1948 in eight volumes is practically completed and the efforts of the staff in the *Foreign Relations* Division of the Historical Office are now centered on compiling that for 1949 in seven volumes. Compilation is thus about 21 years behind currency. This gap has been increasing over the last few years as the understaffed *Foreign Relations* Division is unable to compile the record for one year of diplomacy within one year. Without substantial increase in staff the work will continue to fall further behind.

Last year there was in the *Foreign Relations* Division a staff of 13 professional personnel which was being increased by 1 and a further increase of 1 had been authorized. The authorized professional personnel has continued to be 15, but as of March, 1970, there were 3 vacancies with prospects for only 1 replacement. With an increasing work load the personnel assigned to the work is being allowed to dwindle.

After compilation of the *Foreign Relations* volumes there has been a usual further lag of four or five years in publication during which the work of technical editing, printing, clearance within the Department of State and with other American agencies and with foreign governments, indexing and final printing and binding is done. One can only assume that bureaucratic delays in clearance and the system of contracting out work of technical editing and indexing are important factors in these delays. This subject certainly calls for investigation by responsible high-level administrative officers in the Department.

The basic cause for the increasing lag in the publication of *Foreign Relations* is the low priority given to this project within the Government. A reason for this may be lack of sufficient active interest brought to bear by those within the fields of history, political science, and international law. This committee recommends that the Society again pass a resolution urging greater support for the *Foreign Relations* project and also that concerned individuals make their interest known to appropriate officials in the Department of State and in Congress.

Whiteman's *Digest of International Law*. As at the time of this report three substantive volumes and the index volume remain to be published.



Volume 7 may be expected to appear in May, 1970, and Volumes 14 and 12 in the summer or early fall of 1970. Volume 7 deals with diplomatic missions and embassy property, consular offices and consulates, and also international copyright and industrial property. Volume 14 covers economic relations and the law of treaties. Volume 12 covers legal regulation of the use of force, measures of redress; peacekeeping machinery; peaceful settlement of disputes and the World Court. Work has gone forward on the index as the respective volumes of the *Digest* have appeared, but a substantial amount of consolidation and checking remains to be done. The hope is that the Department of State will arrange for the completion of the index volume without serious delay. When completed, the 15-volume *Whiteman Digest*, together with the 8-volume *Hackworth Digest* and the 8-volume *Moore Digest*, will provide a continuous record of the practice of states, principally the United States, relating to the development of international law.

*American Foreign Policy: Current Documents, 1967*, was released in February, 1970 (Pub. 8495). At the time of the release the Department of State announced (Press release No. 29 of February 3, 1970) that the annual series was being discontinued with the 1967 volume "because of budgetary limitations and the resulting necessity for realigning priorities in the Department's programs and activities." The series has been a useful tool for all those concerned with recent developments in American foreign policy. Annual volumes have appeared for every year from 1956 to 1967 and the period from 1941 to 1955 was covered by a combination of 3 volumes. It appears unlikely that pressure by the Society on the Department will bring about a resumption of the series. Congressional action would be required to overcome budgetary limitations and to re-establish pre-existing priorities.

*U. S. Participation in the UN* (Pub. 8482), released in October, 1969, is the 23rd annual report of the President to the Congress. It covers the calendar year 1968. In the section on legal and constitutional developments, the report discusses the International Court of Justice, the International Law Commission, the law of treaties, special missions, friendly relations, the definition of aggression, the U.N. Commission on International Trade Law, and assistance in international law. 1968 was the year of the first session of the U.N. Commission on International Trade Law (UNCITRAL).

*The Battle Act Report 1969* (Pub. 8517) released in March, 1970, is the 22nd report on operations under the Mutual Defense Assistance Act of 1951. It describes the administration of restrictions on trade and financial transactions with the Communist countries. It also refers to the new Export Administration Act of 1969 which replaced the Export Control Act of 1949 as the basic legislation under which United States exports of strategic goods to Communist countries are controlled.

*World Strength of the Communist Party Organizations*, 1969 edition, is the 21st annual report of the Bureau of Intelligence and Research of the Department of State on Communist party membership. The total number of Communist parties is 87, excluding the United States and allowing for

only one party in any country. The report includes a checklist showing the countries in which the Communist party has been proscribed.

*Sovereignty of the Sea* (Pub. 7849) is a revision of Geographic Bulletin No. 3 and was released in December, 1969. It offers an analysis by the Geographer of the Department of State of the problems of jurisdiction over the sea, with various charts and tables, including a table listing the basic claims of the various states relating to the breadth of the territorial sea as of October 1, 1969.

*Status of the World's Nations* (Pub. 7862) is a revision of August, 1969, of Geographic Bulletin No. 2. It identifies the 136 states generally accepted as independent, lists 8 political units as "quasi-independent states" and mentions several political areas and regimes which "defy classification." In it can be found the geographic nomenclature officially recognized by the United States Government.

*The Latin American Free Trade Association: Progress, Problems, Prospects* is a study prepared by Edward G. Cale under contract with the Office of External Research of the Department of State and may be obtained from the Government Printing Office. It was published in May, 1969 (Pub. 8448). It "considers the regional economic integration objectives of LAFTA, reviews present and potential difficulties, and suggests likely future developments."

*Achievements and Problems of the Central American Common Market* by Andrew B. Wardlaw is another study prepared under contract with the Office of External Research of the Department of State, which may also be obtained from the Government Printing Office. It was published in February, 1969 (Pub. 8437). It "explores ways of expanding the CACM's trading area and discusses the effort by the Central American countries to coordinate their foreign policies in dealing with other countries."

*The Multinational Corporation* is a collection of papers presented at a conference of a group of academic and business authorities at the Department of State on February 14, 1969. It bears the number FAR 9284 and is available without charge from the Office of External Research, Department of State, Washington, D. C. 20520. The conference focused primarily on the industrially advanced countries. A related conference on American direct investment in developing countries was held at the Department of State on May 2, 1969. No document was made available for general public distribution as a result of this second conference but a document entitled "State-Aid Conference on American Direct Investment in the Developing Countries" was prepared for background use only.

*Vietnam Information Notes.* Three numbers have been added to the series: No. 14 of July, 1969, on Pacification in Viet-Nam; No. 15 of November, 1969, on The Paris Peace Talks; and No. 16 of February, 1970, on Basic Data on North Viet-Nam.

*Vietnam: Documents and Research Notes* is a series which began in October, 1967, and had reached No. 74 as of March 30, 1970. The documents and research notes constitute "a selection of significant materials on Southern Viet Cong and North Vietnamese affairs," many of which are

translations of captured documents. Document No. 50 is a listing of the titles of the first 49 items in the series. The materials for the series are issued by the United States Mission in Viet-Nam and are sent by the Department of State to designated research libraries in each state. To find out the nearest library to have received the series a researcher should inquire of the Bureau of Public Affairs of the Department of State.

*Treaties and Other International Agreements of the United States of America 1776-1949.* The second volume of this new and expanded collection of international agreements of the United States was released in June, 1969 (Pub. 8441) and the third volume in January, 1970 (Pub. 8484). There are 12 more volumes to go to complete the collection. The first four volumes contain multilateral agreements arranged chronologically. Volume 2 covers the period of the First World War and comes down to 1930. Volume 3 covers 1931-1945, inclusive.

*United States Treaties and Other International Agreements*, the compilation of international agreements of the United States since 1949, is now complete through 1968. Volume 19 for the year 1968 is divided into six separate parts. A lengthy GATT treaty takes up the first three parts.

*Treaties and Other International Acts Series*, the T.I.A.S. series of separate pamphlet copies of each international agreement, added 187 more titles during the calendar year 1969. The year began with T.I.A.S. 6625 and ended with T.I.A.S. 6812.

*Treaties in Force.* A List of Treaties and Other International Agreements of the United States in Force on January 1, 1970, was released on January 26, 1970 (Pub. 8513). It lists bilateral agreements between the United States and 153 countries or other political entities and 370 multilateral agreements grouped under 80 subjects. Current information regarding developments on treaties concluded by the United States is published in the weekly issues of the *Department of State Bulletin*.

#### PUBLICATIONS OF U. S. DEPARTMENTS AND AGENCIES (Other than the Department of State)

The *Eighth Annual Report to Congress of the United States Arms Control and Disarmament Agency* for the year 1968 was issued in April, 1969, and the ninth annual report for the year 1969 is expected to be released during the month of April, 1970. The Eighth Report includes the following topics: non-proliferation, the nuclear arms race, arms control measures for the seabed, chemical and biological warfare, mutual European force reductions, conventional arms transfers, the impact of reduced defense expenditures on the American economy, and field tests in support of arms control verification.

*Documents on Disarmament 1968* is the most recent of the compilations which have been issued annually by the Arms Control and Disarmament Agency. It was released in September, 1969, as ACDA Pub. 52.

*World Military Expenditures, 1969*, is the fourth report by the Arms Control and Disarmament Agency in its continuing assessment of the size and impact of military expenditures of the nations of the world. It was re-

leased in December, 1969, as ACDA Pub. 53. It carries the study through 1969 and shows the rise in military spending to be continuing, although less sharp. Total world military expenditures in 1969 are estimated to be \$200 billion; \$108 billion for NATO countries; \$63 billion for Warsaw Pact countries; and \$29 billion for other countries.

*The Foreign Assistance Program*, Annual Report to the Congress for fiscal year 1969 by the Agency for International Development (AID) was released in March, 1970. For the third straight year there was a reduction in the size of the program. Commitments by AID for fiscal year 1969 amounted to \$1.69 billion. This figure is \$488 million less than the corresponding figure for 1968.

#### CONGRESSIONAL COMPILATIONS AND REPORTS

*Legislation on Foreign Relations with Explanatory Notes*, prepared annually as a joint project of the Senate Committee on Foreign Relations and the House Committee on Foreign Affairs, was expected to be published during the middle of April, 1970, but was not available at the time of preparation of this report.

The *Legislative Calendar of the Senate Committee on Foreign Relations* for March 26, 1970, lists 15 treaties as still pending before the Committee. Of these 3 were sent to the Senate by President Truman: the Inter-American Convention on Political Rights for Women, the Genocide Convention, and the ILO Convention on the Freedom of Labor to Organize. Two were sent down by President Eisenhower: a convention on international plant protection and an optional protocol concerning the settlement of disputes relating to the law of the sea. Three were sent down by President Kennedy: two ILO conventions and the Convention on the Political Rights of Women. Three were sent down by President Johnson: two double taxation treaties and one ILO treaty. And four were sent down by President Nixon: two double taxation, one extradition and one radio communications treaty. President Nixon has sent to the Senate 13 treaties. The nine treaties thus far approved include the Convention Establishing the World Intellectual Property Organization, the Vienna Convention on Consular Relations and the Convention on the Privileges and Immunities of the United Nations. On February 19, 1970, President Nixon took the unusual step of sending to the Senate a renewal of a previous request for action on a convention—the Genocide Convention.

*National Commitments* is a report prepared by the Senate Committee on Foreign Relations on April 16, 1969 (S. Report No. 91-129). In the report the Committee recommended the adoption of a resolution expressing the understanding of the Senate regarding the means required to make a national commitment. The report traces the passing of the war power from Congress to the Executive after World War II, questions the manner in which commitments are alleged to have been made and supports the restoration of "constitutional balance."

*Executive Reports* of the Senate Committee on Foreign Relations of the 91st Congress, 1st Session, on treaties approved by the Senate include: No.

91-1 on the Treaty on the Nonproliferation of Nuclear Weapons; No. 91-3 on the Convention on Offenses Committed on Board Aircraft; No. 91-9 on the Vienna Convention on Consular Relations; No. 91-13 on the Intellectual and Industrial Property Conventions; and No. 91-17 on the Convention on the Privileges and Immunities of the United Nations.

*A Select Chronology and Background Documents relating to the Middle East* (first revised edition) is a Committee print of the Senate Committee on Foreign Relations of the 91st Congress, 1st Session, issued in May, 1969. There are 91 pages of chronology and 194 pages of documents. The period covered is from 1946 to 1969.

*Background Information relating to Peace and Security in Southeast Asia and Other Areas* is another Committee print of the Senate Committee on Foreign Relations, issued in January, 1970. It was prepared to facilitate the consideration by the Committee of various bills and resolutions pending before it relating mainly to Viet-Nam. The print includes the texts of the pending resolutions together with Department of State comments. It also includes the texts of relevant area resolutions and pertinent excerpts from collective defense treaties.

*Collective Defense Treaties with Maps, Texts of Treaties, A Chronology, Status of Forces Agreements, and Comparative Chart* is a Committee print of the House Committee on Foreign Affairs issued on April 21, 1969. It is a revision and updating of a 1967 compilation, and runs to 514 pages. It includes not only treaties to which the United States is a party but also treaties to which the United States is not a party, principally British and French mutual defense treaties. The texts of six Congressional resolutions concerning situations endangering peace and security are quoted. The comparative chart presents in parallel columns provisions drawn from eight regional collective security agreements on such specific points as: consultation, action in the event of armed attack, and relationship to United Nations and other treaties.

*U. S. Foreign Policy for the 1970's: A New Strategy for Peace* is a report made by President Nixon to the Congress on February 18, 1970 (H. Doc. 91-258). It is a comprehensive report on foreign affairs on behalf of the Administration as a whole, a report on the Administration's "stewardship of foreign relations." The four parts are: the National Security Council system; partnership and the Nixon Doctrine; America's strength; and an era of negotiation. In conclusion the President offers a new definition of peace.

*New Directions for the 1970's: Toward a Strategy of Inter-American Development*, a report by the Subcommittee on Inter-American Affairs of the House Foreign Affairs Committee, was issued on July 22, 1969 (H. Rept. No. 91-385). It summarizes expert testimony presented at hearings from February to May, 1969. It concludes that the \$8.3 billion of U. S. assistance to Latin America during the past seven years has produced "only modest visible development gains" and that a new strategy of development is required.

*United States Contributions to International Organizations* for the fiscal year 1968 (H. Doc. 91-197) contains a brief description of the international

organizations to which the United States Government makes assessed or voluntary contributions. A total of \$298.7 million was contributed in fiscal year 1968, of which \$115 million were assessed and \$170.5 million were voluntary contributions. In addition contributions of \$13.2 million were made to two U.N. peacekeeping operations.

*Toward Peace with Justice in Vietnam* is a report prepared by the House Committee on Foreign Affairs on November 13, 1969 (H. Rept. No. 91-643) recommending the adoption of a resolution in support of the President's policy in Viet-Nam.

*Report of Special Study Mission to Southern Africa* is a Committee print of the House Committee on Foreign Affairs, dated October 10, 1969. In it Congressmen Diggs and Wolff report on their mission to Angola, Mozambique, Swaziland, Lesotho, Botswana, Zambia, Malawi, and Tanzania during the period from August 10 to August 30, 1969. They analyze briefly the freedom movements in southern Africa, and recommend a new U. S. foreign policy for Africa. There are 36 pages of text and 142 pages of appendices which include listings of American firms, subsidiaries and affiliates in southern Africa.

*Report of Special Fact-Finding Mission to Nigeria* (February 7-20, 1969) is also a Committee print of the House Foreign Affairs Committee, released on March 12, 1969. The 18-page mission report is accompanied by a chronology of developments from November 15, 1968, to February 15, 1969, reports of the international observer team invited by Nigeria to observe Federal army operations in the area affected by warfare, and a report on disaster emergency relief.

#### UNITED NATIONS PUBLICATIONS

##### *In General*

"We are overwhelmed with United Nations documentation," complained a United States representative late in 1969.<sup>1</sup> Canada found that even the most affluent nations were having trouble with the "flood of papers."<sup>2</sup> The General Assembly itself recognized the problem, "reiterating its concern at the growing volume of the publications and documentation of the United Nations which Governments are finding increasingly difficult to use effectively."<sup>3</sup> These comments are noted not in criticism but to explain the difficulty of identifying U.N. publications of legal interest to be noted in this report.

<sup>1</sup> U.N. Press Release GA/AB/1203 (1969).

<sup>2</sup> New York Times (Sept. 30, 1969), at p. 32, col. 6.

<sup>3</sup> A/RES/2538(XXIV). The Secretary General's proposals for limiting documentation are contained in A/7579 (1969) and in E/L.1249 and Add. 1-2 (1969). Under the circumstances, it is perhaps not surprising that the U.N. Administrative Tribunal rejected the plea of a summarily dismissed employee who attempted further to burden delegations by distributing through official channels copies of his personal complaint, marked "restricted and confidential" and resembling a U.N. document in appearance. Judgments of the United Nations Administrative Tribunal, Nos. 87 to 113, 1963-1967, AT/DEC/87 to 113 at 176 (1969).

Access to legally relevant U.N. documents through specialized indexing (beyond the general U.N. Documents Index) is still at a rudimentary stage. While a monthly unofficial report on U.N. legal developments continues,<sup>4</sup> containing many citations, a request to the Headquarters Library from the Office of Legal Affairs for indexes to various legal publications had to be postponed due to lack of staff.<sup>5</sup>

Distribution of U.N. publications is accomplished through depository libraries and through the U.N. Programme of Assistance in the Teaching, Study, Dissemination and Wider Appreciation of International Law. While there were still 27 Member States without a depository library at the end of 1968,<sup>6</sup> sets of U.N. legal publications were supplied through the Programme to 15 institutions in developing countries during 1967 and to a further 20 institutions in 1968, with 15 more scheduled for 1969.<sup>7</sup> This Society offered these institutions complimentary copies of its publications.<sup>8</sup> Fourteen Member States had neither arrangement.

Regulations on access to League of Nations Archives were published at the end of 1969. Some of the principles involved are open to question. Access to whole files is governed by the most recent item in them. Thus a document dated 1925 would not now be generally available, despite its being more than 40 years old, if the same file contained another document dated 1935. Assuming it is necessary for League documents to be kept from the general public (exceptions being possible for "researchers proving a legitimate interest") for as long as 40 years, it would seem that individual documents of greater age should not be further closed simply because they happen to be in a file which contains newer documents. Similarly objectionable is the rule that entire files must be closed for 60 years if any documents in them are of certain types. If a single paper, for example, "might injure the repute . . . of individuals," possibly it alone should be closed for as long as 60 years, but this should not apply to all other papers in the same file.

Scholarly scrutiny of U.N. affairs is bound to be hampered by restrictions imposed on the distribution of documents in the "limited" series issued by the Commission on Human Rights. Documents from all U.N. bodies in the "limited" series are omitted from the distribution to depository libraries. In the case of the Commission, they are even eliminated from mention in the daily list of published U.N. documents. Persons present at meetings, whether representing governments or non-governmental organizations, can obtain the "limited" series on the spot along with other documents under consideration. Those who rely on the daily list for current document information may not even be aware of the existence of those in the "limited"

<sup>4</sup> United Nations Law Reports, edited by the Chairman of this Committee and distributed by Walker Publishing Company, Inc., 720 Fifth Avenue, New York, N.Y., 10019.

<sup>5</sup> Annual Report of the Headquarters Library, etc., 1968, ST/LIB/23 at 4 (1969).

<sup>6</sup> *Ibid.* at 17. At the end of 1968 there were 293 depositories in 102 states and territories.

<sup>7</sup> A/7740 at 7 (1969).

<sup>8</sup> *Ibid.* at 8.

series until such time as they appear in printed official records.<sup>9</sup> Such treatment of documents which, despite their designation, are not limited in their distribution on grounds of confidentiality, can only be described as unnecessarily restrictive.

Restrictive distribution, which is not only unnecessary but somewhat self-defeating, has occurred in the new Committee on the Elimination of Racial Discrimination. Being the creation of the Convention approved by the General Assembly in 1965 and effective in early 1969, the Committee is not a purely U.N. organ,<sup>10</sup> but still held its first session at U.N. Headquarters, where U.N. press releases but no other records of its proceedings were published. Even rules of procedure provisionally adopted by the Committee (CERD/C/R.10), were covered by a decision that records should be issued only to Committee Members and U.N. States Members. Also not published was a statement adopted by the Committee on its responsibilities under Article 15 of the Convention, which deals with petitions from non-self-governing territories (CERD/C/R.11). Two Committee Members were reported in a press release to have expressed the desire to keep the Committee's records away from non-governmental organizations. Ironically the records of an earlier session of the States Parties to the Convention, including rules of procedure they adopted, were published a little later (CERD/SP/3).

Hopefully the Racial Discrimination Committee will decide at its session this summer to publish its provisional rules before finally adopting them. In this way the Committee would give itself the benefit of comment, possibly quite helpful, from the non-governmental organizations and academic communities. This is particularly important since, under the guidance of Professor Frank C. Newman, model rules had previously been drafted and published in an effort to assist the Committee (56 Calif. Law Rev. 1569 (1968)). The Committee might benefit in the same manner by publishing its statement on Article 15, as well as others of its documents which do not involve allegations of racial discrimination such as to require their being kept confidential.

### *International Agreements*

The Convention on the Law of Treaties was adopted on May 22, 1969, by a Conference whose work was based on a draft prepared between 1960 and 1966 by the International Law Commission. The Conference also adopted a Declaration which "solemnly condemns the threat or use of pressure in any form, whether military, political, or economic, by any State in order to coerce another State to perform any act relating to the conclusion of a treaty in violation of the principles of the sovereign equality of States and freedom of consent." (A/CONF.39/26 at 7.) On July 31, 1969,

<sup>9</sup> In May, 1970, two months after the Commission session and a month after completion of this report, Commission documents in the limited series were published in mimeographed form, E/CN.4/1038.

<sup>10</sup> For an instance of resistance to U.N. procedures by a "treaty organ," see Report of International Narcotics Control Board on its work in 1969, E/INCB/5 at 27.



Nigeria became the first country to ratify or accede to the Convention, out of the 35 needed for effectiveness.

Agreements recently becoming effective included the 1968 International Sugar Agreement, effective June, 1969, the 1968 agreement establishing the Asian Coconut Community, in force since July, 1969, when Indonesia became the third country to ratify or accept it, and the 1963 Tokyo Convention on Offences and Certain Other Acts Committed on Board Aircraft, effective in December by virtue of the twelfth ratification, that of the United States. The General Assembly invited states' acceptance of the Tokyo Convention (A/RES/2551 (XXIV)), while adopting (A/RES/2530 (XXIV)) a new Convention on Special Missions and Optional Protocol concerning the Compulsory Settlement of Disputes. In January, 1970, a special session of the U.N. Commission on Narcotic Drugs drafted a Protocol on Psychotropic Substances, which would require states parties to punish intentional production, possession, purchase, sale or transport of specified substances. ECOSOC in March asked for a 1971 conference of plenipotentiaries to adopt such a protocol.

A regional treaty was cited in the United Nations in June, 1969, when Kuwait, charged by Israel with "participating actively in the recurrent acts of aggression of the United Arab Republic in the Suez Canal sector" (S/9254), invoked the "Arab Defence Pact which stipulates under Article 2 in pursuance of Article 51 of the Charter of the United Nations, that: 'The contracting States shall consider any armed attack against one or more of them or on its or their forces as an attack against them all, consequently they undertake in exercise of the legitimate right of individual or collective self-defence to assist the State or States so attacked, and to take forthwith, individually and in concert with the other parties, all necessary measures and to use all means at their disposal, including the use of armed force, to repel the aggression and to restore peace and security.'" (S/9256.)

An interpretation of the 1925 Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare was adopted by the General Assembly over United States opposition (A/RES/2603 (XXIV)). "The use in international armed conflicts of . . . any chemical agents of warfare . . . which might be employed because of their direct toxic effect on man, animals or plants" and "any biological agents of warfare—living organisms, whatever their nature, or infective material derived from them—which are intended to cause disease or death in man, animals or plants, and which depend for their effects on their ability to multiply in the person, animal or plant attacked," was declared "contrary to the generally recognized rules of international law, as embodied in the Protocol." The Assembly noted existing U.S.S.R. and U.K. draft conventions on chemical and biological warfare, and welcomed a 1969 Secretariat report (A/7575).

There is disparity in the availability of *travaux préparatoires* between conventions originating with the International Law Commission, such as those on the Law of Treaties and Special Missions, and conventions like that on Elimination of All Forms of Racial Discrimination, which originated

in other bodies. *Travaux* in the Commission are printed annually; those in the Sub-Commission on the Prevention of Discrimination and the Protection of Minorities are only mimeographed. Ideally the Racial Discrimination Convention should be supported by a separate volume of *travaux* containing the relevant parts of the reports, not only of the Sub-Commission, whose documents are not printed, but also of the other bodies which developed the text, the Commission on Human Rights, the ECOSOC Social Committee, and the Third and Fifth Committees of the General Assembly.

One recent proposal on U.N. record-keeping would change *travaux* research from a reading to a listening process. A member of the Joint Inspection Unit has proposed temporary substitution of minutes for summary records of meetings, followed by elimination of even minutes in favor of tape recordings (E/4802). Minutes were tried in place of summary records at a session of one U.N. body, resulting in a cost saving of 67%. The author noted, however, that "it is natural that bodies dealing with a difficult subject or the drafting of articles of a legal instrument should prefer that the relevant discussions be recorded in greater detail." (*Ibid.* at 10.) Then he went further:

Indeed, the process of transcribing oral proceedings on paper and storing them in bulky volumes belongs to an antiquated technology that is being replaced everywhere by more modern methods and in the first place by sound recordings. (*Ibid.* at 14.)

Naturally the most complete record of *travaux préparatoires* would be the audible notation of every word spoken, but elimination of all written *travaux* would necessitate ready availability in their place of copies of tape recordings.

The "Wider Acceptance of Multilateral Treaties" was the subject of a 213-page study by the U.N. Institute for Training and Research, the first of a series in the field of international law. The study, as described in the preface, "ascertains empirically to what extent the extrinsic factors . . . operate as impediments to acceptance." It also "analyses and describes the range of national and international measures for the wider acceptance of treaties which include, among others, appeals and exhortation, provision of advisory services and technical assistance, wider dissemination of information, revision of treaties and special national administrative machinery for treaty work." To similar effect, the International Law Commission, in a memorandum on "the final stage of the codification of international law," suggested that the problem of "securing the earlier and wider final acceptance by States of the rules they have jointly drawn up and adopted" be attacked by extending to all general U.N. conventions "the system in force in some of the specialized agencies. These are, particularly, the International Labour Organization and, to some extent, UNESCO and WHO—organizations whose work is reflected mainly or at least partly in the adoption of conventions—which possess constitutions . . . laying down in positive terms the dual obligation to cause the convention to be considered within a specified time by the authorities responsible for the decision to

ratify and, failing satisfaction, to report to the appropriate international body, specifying in writing the reasons for that situation." (A/CN.4/205/Rev. 1 at 9, 12.)

### *Codification and Development of Law*

The U.N. International Law Commission concluded in August, 1969, its 21st session, having discussed four topics: relations between states and international organizations, succession of states and governments, state responsibility and the most-favored-nation clause. With regard to the first topic, the Commission adopted a provisional draft of 29 articles relating to representatives of states to international organizations. The draft includes three sections: (1) facilities, privileges, and immunities of permanent missions to international organizations; (2) conduct of a permanent mission and its members; and (3) ending of the functions of a permanent representative. These articles, together with 21 draft articles approved by the Commission previously, are intended to form the basis for a convention on the subject of relations between states and international organizations.

On succession of states and governments, the Commission had before it the second report of Mohammed Bedjaoui, its Special Rapporteur on succession in respect of matters other than treaties, entitled "Economic and financial acquired rights and State succession" (A/CN.4/216/Rev. 1). Sir Humphrey Waldock, Special Rapporteur on succession in respect of treaties, also submitted a second report on this aspect of the topic. Members of the Commission expressed the opinion that the codification of the rules relating to succession in economic and financial matters should not begin with the preparation of draft articles on acquired rights. The Commission requested the Special Rapporteur to prepare a new report containing a set of draft articles on public property and public debts, taking into account the comments made by the members of the Commission on his two reports submitted at the Commission's twentieth and twenty-first sessions.

On the subject of state responsibility, the Commission asked the Special Rapporteur, Roberto Ago, to submit in 1970 a further report containing a first set of draft articles.

The General Assembly in Resolution 2501 (XXIV) recommended that the Commission continue its work on relations between states and international organizations, succession of states and governments, and state responsibility, and continue its study of the most-favored-nation clause.

Commission documents published during the past year also included the second report on succession of states in respect of matters other than treaties (A/CN.4/216), and the sixth study on succession of states to multilateral treaties (A/CN.4/210), the latter dealing with agreements concluded under and deposited with the Food and Agriculture Organization.

The U.N. Commission on International Trade Law (UNCITRAL) has continued to publish material of interest to practitioners and teachers alike. These include documents dealing with replies by states concerning the Hague Convention of 1955 on the law applicable to international sale of goods (A/CN.9/12/Add.4); bankers' commercial credits (A/CN.9/15/

Add.1); time limits and limitations (prescription) in the field of international sale of goods (A/CN.9/16/Add.1 and 2); the U.N. Convention of 1958 on Recognition and Enforcement of Foreign Arbitral Awards (A/CN.9/22/Add.2); training and assistance in the field of international trade law (A/CN.9/27); additional replies and studies by states concerning the Hague Conventions of 1964 (A/CN.9/11/Add.3), and concerning the Hague Convention of 1955 on the law applicable to international sale of goods (A/CN.9/12/Add. 3); a comparative survey of security devices under national laws (A/CN.9/20/Add.1); a note on the proposed registers of organizations and texts (A/CN.9/24), together with related bibliographical material (A/CN.9/24/Add.2); Secretariat reports on co-ordination of the work of organizations active in international trade law (A/CN.9/25); a Bibliography on Arbitration Law (A/CN.9/24/Add.1), containing 54 pages of titles of books and articles; a supplementary U. S. statement concerning the Hague Conventions of 1964 relating to uniform laws on the international sale of goods and the formation of contracts for such sale (A/CN.9/11/Add.4); and a report of the International Chamber of Commerce on Bank Guarantees (A/CN.9/37).

An UNCITRAL Working Party on Time Limits and Limitations held its first session in August, 1969, having been given the task of preparing a draft convention which would establish the maximum period of time within which a party to a contract for an international sale of goods might bring action against another party. As different periods were established in the laws of different countries, UNCITRAL felt that it would be helpful for those engaged in international trade if a uniform period were widely accepted in the world, so as to reduce the existing difficulties and uncertainties facing a buyer or seller wishing to bring legal proceedings in another country. The Working Group's report (A/CN.9/30) was published late in 1969.

The General Assembly in Resolution 2502 (XXIV) recommended that UNCITRAL continue its work on the international sale of goods, payments, commercial arbitration, and shipping legislation, while approving in principle the publication of an UNCITRAL Yearbook. International shipping legislation was also the subject of a working group established in April, 1969, by the Committee on Shipping of the U.N. Conference on Trade and Development (UNCTAD), with the objective of making recommendations to UNCITRAL as a basis for drafting new legislation on matters such as charter parties, marine insurance and general average, and bills of lading. A report, "International Legislation on Shipping" (TD/32/Rev.1, Sales No. E.69.II.D.2(39 pp.)) was published in March, 1969.

Legal development in the economic field was urged by a U.N. non-governmental organization, Pax Romana, which "is convinced, moreover, that it is necessary to evolve not only an ethic of man but also an ethic of the international community. In that regard, we believe that it is necessary to go beyond 'goodwill' in the matter of international cooperation and to move towards the recognition of a genuine obligation, based on the notion of international solidarity. . . . [T]his notion of international solidarity is

borne in upon us with such force that it only remains for us to introduce it into our institutions by converting it into a recognized concept of public international law.

"Furthermore, the right of peoples to development, which was solemnly affirmed by His Holiness Pope Paul VI during his visit to the ILO, flows directly from this concept of international solidarity. As Caritas Internationalis points out in the 'Declaration on the Rights of Developing Countries' (E/C.2/675, of 14 July 1969), it is the inalienable right of developing nations to receive the economic, political, cultural, and scientific resources which are needed to undertake their own development at all levels. There is thus a new *jus gentium* which we are called upon to accept and which we must have the courage to proclaim." (E/C.2/683 at 4.)

Development of law governing economic aspects of deep sea resource exploitation was projected in two mid-1969 U.N. Secretariat reports. One dealt with "the question of the way in which jurisdiction is to be exercised over these mineral resources" (E/4680 at 122). The other Secretariat study, on appropriate international machinery for promotion of exploration and exploitation of resources beyond national jurisdiction, deals with legal issues concerning (a) the relation between existing law of the sea and international machinery and (b) the position of states which do not become parties to an agreement establishing machinery relating to exploration and exploitation (A/AC.138/12/Add.1). "If international machinery were to be set up with authority to grant licenses in respect of sea-bed activities, it would appear to be necessary to create some form of international bureau, institution or organization." (*Ibid.* at 4.) "If machinery were to be established with exclusive rights to conduct exploration and exploitation of the ocean floor, it is most likely to take the form of a separate international organization." *Ibid.* at 5. "In the event that it was decided to set up a separate intergovernmental organization it would be necessary to conclude a treaty, binding on the States parties thereto." (*Ibid.* at 8.)

"In conclusion it may be said that, in the event that a State declined to become a party to a treaty establishing international machinery relating to the exploration and exploitation of sea-bed resources, it would not acquire any obligations or rights under the instrument." (*Ibid.* at 57.)

The General Assembly in Resolution 2574 (XXIV) asked for Member States' views on the desirability of an early law of the sea conference, particularly to define the limit of national jurisdiction over the seabed; requested further Secretariat study on international control machinery; and declared that, pending establishment of an international regime, "states and persons, physical or juridical, are bound to refrain from all activities of exploitation of the resources of the area of the sea-bed and ocean floor, and the subsoil thereof, beyond the limits of national jurisdiction." The Assembly also urged in Article 9 of its 1969 Declaration on Social Progress and Development "recognition of the common interest of all nations in the exploration, conservation, use and exploitation, exclusively for peaceful purposes and in the interests of all mankind, of those areas of the environment such as outer space and the sea-bed and ocean floor and the subsoil

thereof, beyond the limits of national jurisdiction in accordance with the purposes and principles of the Charter of the United Nations.”

A report published in August, 1969, by the Legal Sub-Committee of the Committee on the Peaceful Uses of the Sea-Bed and Ocean Floor had noted a common denominator

that the sea-bed and ocean floor, and the subsoil thereof, beyond the limits of national jurisdiction, shall not be subject to national appropriation by any means and that no State shall exercise or claim sovereignty or sovereign rights over any part of it. . . . An agreement seems to have emerged on the need for the establishment of a regime as well as on the use of the resources for the benefit of mankind irrespective of the geographical location of States and taking into account the special interests and needs of the developing countries. The qualification of that regime is still to be agreed upon as well as the scope of the applicability. Whether the regime shall be characterized as legal, international or agreed remains to be decided on, but it was agreed that the regime should be legally binding. Similarly whether the regime shall apply to the area or only to resources is a matter still to be settled. No agreement has yet been reached on the main feature of such a regime. Thus, for example, the question of the most appropriate and equitable application of benefits obtained from the exploration, use and exploitation of this area to the developing countries, which was underlined by a number of delegations is still under consideration. (A/AC.138/18/Add.1 at 2-3.)

The 1969 Special Committee on Principles of International Law Concerning Friendly Relations and Co-operation Among States concluded a session and adopted two reports of its Drafting Committee, one on the principle of equal rights and self-determination of peoples (A/AC.125/L.76) and the other on the principle that states shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the U.N. (A/AC.125/L. 77).

A Secretariat report was published in November, 1969, on “Respect for Human Rights in Armed Conflicts” (A/7720), including among its subjects the “need of preparing additional international humanitarian instruments.” The General Assembly requested the Secretary General, by Resolution 2597 (XXIV), to continue the study, “giving special attention to the need for protection of the rights of civilians and combatants in conflicts which arise from the struggles of people under colonial and foreign rule for liberation and self-determination and to the better application of existing humanitarian international conventions and rules to such conflicts.”

#### *Periodical Publications*

Among the United Nations’ periodical publications not mentioned elsewhere in this report, there should be noted the appearance in July, 1969, of the “Human Rights Bulletin,” issued by the Division of Human Rights in mimeograph on a twice-a-year schedule. The General Assembly had expressed the view in Resolution 2441 (XXIII) that the newsletter issued during the 1968 International Year for Human Rights had been useful

and accordingly had asked the Secretary General to "continue to issue from time to time an appropriate bulletin containing information on the activities of the United Nations and of the specialized agencies in the field of human rights and a bibliography of United Nations documents and publications on that subject." The initial issue contains information on the first half of 1969 and states that "its aim is to provide, in a convenient form, information which may facilitate research by those who are interested in undertaking independent studies of United Nations human rights programmes." (p. 3.) The new periodical could be aided through suggestions from interested persons on material to be included. Further detail on the ILO's freedom of association inquiries would help to acquaint the U.N. human rights community with the extent to which ILO surpasses U.N. procedures in the scope and effectiveness of its methods.

The Committee would hope to see the "Human Rights Bulletin" upgraded in size, content, and paper quality to match that of another new U.N. human rights periodical of narrower substantive range, the Office of Public Information's "Objective: Justice," whose first two issues were published in late 1969 and early 1970. The purpose announced by OPI is to give the widest dissemination to information concerning "the interlocking evils of apartheid, racial discrimination and colonialism." Signed articles are included, such as "The United Nations: What Can It Do?" by Robert Resha of the African National Congress, and "Trade Boycott: Can It Work?" by Professor Elliott Zupnick of the City University of New York. Future issues are to "stress the positive alternative of a multiracial society based on the principles of racial equality." (E/CN.4/1019/Add. 1 at 2.)

The periodic reports on human rights issued during the past year dealt with economic, social, and cultural rights from mid-1966 to mid-1969. Reports from 32 governments were published (E/CN.4/1011 and Addenda 1-8), as well as reports from 6 specialized agencies (E/CN.4/1012 and Addendum 1). Comments were submitted by 12 non-governmental organizations, but these were not published, a fact which is bound to detract from the incentive for such organizations and possibly also from the quality of their submissions. The effect of publication in encouraging impressive presentations is illustrated by the U.S.S.R. and U.S.A. reports juxtaposed in Document E/CN.4/1011/Add.3.

In recent years the Secretariat has facilitated examination of the material in the reports by publishing an analytical summary. Such a summary was issued in February, 1970 (E/CN.4/1024 and Addenda 1-2) just in time for the 1970 session of the Human Rights Commission's *Ad Hoc* Committee on Periodic Reports. The Committee in turn reported to the Commission (E/CN.4/1026), which, because of the tightness of the schedule, recommended to ECOSOC that the system be protracted by one year. In such case, reports on freedom of information during 1967-1970 will be analyzed and reported on to the Commission at its 1972 session rather than in 1971 as the present schedule would require. While causing some staleness of information, the delay seems to be needed for adequate analysis.

The kind of insight which can result from careful scrutiny of periodic

reports is illustrated by the *Ad Hoc* Committee's observation of "the discovery by several States that the genuine exercise of these [economic, social and cultural] rights in the developing countries depends not on those countries alone but also on international action by the United Nations, by the specialized agencies and by the international community." (E/CN.4/1026 at 17.)

A Secretariat study on "The Establishment of an UNCITRAL Yearbook" (A/CN.9/32), whose publication the General Assembly approved in principle as noted above, describes for purposes of analogy other yearbooks: the *Yearbooks* of the International Court of Justice, the International Law Commission, and the International Institute for the Unification of Private Law (UNIDROIT), and the U.N. *Juridical Yearbook*, whose 1967 edition was issued in October, 1969 (Sales No. E.69.V.2 (467 pp.)).

The 1967 *Juridical Yearbook*, like its predecessors, contains much of interest and value to internationally minded lawyers. Material presumably not previously published includes an exchange of letters between the U.N. and Italy settling with a lump-sum payment claims lodged by Italians for damage to persons and property done by the U.N. Force in the Congo (p. 77), and Secretariat legal opinions on dual or multiple representation in U.N. Organs (p. 317), and on the eligibility of the West Indies Associated States for associate membership in the U.N. Economic Commission for Latin America (p. 320). Material previously published in mimeographed form but now usefully re-issued included Secretary General reports on the withdrawal of the U.N. Emergency Force in the Middle East (p. 87), and on consultations with the World Bank concerning withholding its assistance from Portugal and South Africa (p. 108); a UNESCO Executive Board resolution on procedure for handling human rights complaints (p. 264); and a Secretariat legal opinion on whether the U.N. Council for South West Africa has power to issue travel documents (p. 309). It is not explained why "no decisions of national tribunals on questions relating to the United Nations and related intergovernmental organizations were communicated for 1967" (p. 376). If such decisions are desirable, their inclusion should not be frustrated by the failure, presumably of governments, to inform the Secretariat of their existence. Private lawyers' groups could also furnish such information.

The *Yearbook of the United Nations* for 1967 was published in December, 1969.

#### *Reports, Articles, and Memoranda*

The Dag Hammarskjöld Library at U.N. Headquarters has published a valuable research tool in "Statutes and Subsidiary Legislation, A Selected Source List of Collections, Bibliographies and Other Aids" (ST/LIB/24). The booklet is designed to familiarize the library staff with available sources of texts of laws, decrees, ordinances, regulations, etc., of the various countries of the world, requests for which from library users are described as "frequent and sometimes obscure." (*Ibid.* at 2.) Periodic updating of this publication should assist librarians generally.



Legal problems anticipated in future international broadcasting by satellite are dealt with in a working group report dated August, 1969, noting that

In the course of discussion of general legal issues, a number of suggestions were put forward to the effect that in order to ensure that the principle of national sovereignty and non-interference in the internal affairs of States are respected, some prohibitions would be necessary in any legal regulations devised. Among these suggestions was a prohibition on broadcasts beamed from satellites by one State to others without the explicit prior consent of the Governments concerned through bilateral or multilateral agreements. It was suggested by some delegations that in order to enhance friendly relations among peoples and States, it would be unsuitable to broadcast programmes which might hurt the national sentiments of the people of a country, even if the broadcast were not intended for them. . . .

It was suggested that the problems of political content of transmissions via satellites might be overcome by the acceptance of a code of conduct or programme standards through international co-operation. Some delegations suggested that such a code would need to embody bans on specific activities. Some scepticism was expressed, however, as to whether a generally accepted code could be prepared and implemented, given differing views regarding, for example, freedom of speech, censorship and control of media. (A/AC.105/66 and Corr. I at 6-10.)

National viewpoints on these issues are reflected in documents submitted to the working group, *e.g.*, those of France (A/AC.105/62); Australia (A/AC.105/63); and the United Kingdom (A/AC.105/65). An international view of the right to broadcast within a country's boundaries without its consent was expressed in General Assembly Resolution 2547B (XXIV) of December, 1969, in which by a vote of 86-2-21 the Secretary General was asked "to set up a unit of the United Nations radio in Africa to produce and broadcast radio programmes to the peoples of southern Africa."

In the field of tax reform planning, the General Assembly in Resolution 2562 (XXIV) of December, 1969, requested the Secretary General to prepare "a comprehensive study of the taxation systems in developing countries including those applicable to domestic as well as foreign capital, with a view to evaluating their effects on and contribution to the mobilization of resources and the distribution of income."

An area of U.N. concern since the 1968 International Conference on Human Rights is the effect of scientific and technological developments on human rights. The General Assembly in Resolution 2450 (XXIII) of 1969 requested the Secretary General to prepare a preliminary report including a summary account of studies already made or in progress on the following subjects:

- (a) Respect for the privacy of individuals and the integrity and sovereignty of nations in the light of advances in recordings and other techniques;
- (b) Protection of the human personality and its physical and intellectual integrity, in the light of advances in biology, medicine and biochemistry;

- (c) Uses of electronics which may affect the rights of the person and the limits which should be placed on such uses in a democratic society;
- (d) More generally, the balance which should be established between scientific and technological progress and the intellectual, spiritual, cultural and moral advancement of humanity.

The preliminary report (E/CN.4/1028 and Addenda) was submitted to the 1970 session of the U.N. Commission on Human Rights. In contemplating further study of the area, the Secretary General noted that "the resources of the Secretariat would be used to the fullest extent possible, but, in view of the complexity of the subjects involved, the assistance of qualified experts would also be required in order to secure adequate comprehension of the specialized problems arising." (E/CN.4/1028/Add.4 at 3.)

Perhaps the American Society of International Law would be in a position to lend such expert assistance. Similarly the Society might contribute valuable expertise to the refinement of the Secretariat's recently issued model rules of procedure for United Nations bodies dealing with violations of human rights (E/CN.4/1021). The Human Rights Commission's recent investigations, such as that of alleged Geneva Convention violations in the occupied Middle East (E/CN.4/1016 and Addenda), proceeded without the benefit of any such rules. The loss of credibility inevitably resulting from lack of procedural rules presents a situation to whose improvement a professional organization can lend unique support.

#### U.N. SPECIALIZED AGENCIES

The importance to lawyers of much of the specialized agencies' documentation is illustrated by examples from that of the International Civil Aviation Organization (ICAO), the Food and Agriculture Organization (FAO), and the International Labor Office (ILO).

The Legal Committee of ICAO recently drafted a treaty seeking to deal with "hijackers" and recommended modification of the Warsaw Convention. The 27-member ICAO Council circulated the draft treaty and called a diplomatic conference for December, 1970, to adopt an agreement to deter acts of violence or intimidation to seize control of civilian aircraft in flight. Absolute liability of carriers up to \$100,000, regardless of fault except where the claimant helps cause the accident, was proposed by the Legal Committee.

FAO has published *Limits and Status of the Territorial Sea, Exclusive Fishing Zones, Fishery Conservation Zones and the Continental Shelf* (FAO Legislative Series No. 8). The survey covers 106 countries and territories and updates a previous study. It expresses no opinions on the extent of jurisdiction.

The third publication illustrating the importance to lawyers of the U.N. specialized agencies' documentation is the ILO's *Report of the Study Group to Examine the Labour and Trade Union Situation in Spain* (52 Official

Bulletin, No. 4, Second Special Supplement (1969)).<sup>11</sup> The ILO established the Group in 1968 at Spain's suggestion, following examination by the ILO Committee on Freedom of Association of a number of complaints by workers' organizations against the Spanish Government. The 300-page report includes a 45-page description of labor legislation, administration and courts. The effective application of international jurisdiction is described at p. 83:

The appropriate organs of the ILO periodically consider the question of how the Conventions ratified by Spain are applied by that country. . . . These bodies, in the discharge of their duties, have raised certain questions (not implying major divergencies between Spanish legislation and ILO Conventions), and the Spanish Government has from time to time taken action to bring its national legislation into line with the Conventions concerned.

The breadth of the Study Group's approach is indicated among the conclusions at p. 275:

The dominant mood in Spain is one of adjustment to a scale and rate of change unprecedented in the nation's history. Whatever may happen on the political stage, the economic and social transformation of the nation is proceeding apace. The impact of industrial development and twentieth century technology is transforming the economic foundations of Spanish society.

The high level of the Group's analysis is shown at p. 297:

In the world in which we now live no national genius, however distinctive, can disregard the ethos and mores of the world as a whole, without severe loss. Spain's place in the world will be significantly influenced by her attitude towards world standards. In labour and trade union matters, and in respect of the civil liberties the relevance of which to trade union rights is about to be considered by the International Labour Conference, there are unequivocal world standards. These standards are to be found in the International Covenants on Civil and Political Rights, and on Economic, Social and Cultural Rights, approved unanimously by the General Assembly of the United Nations on 16 December 1966 by 106 and 105 affirmative votes respectively, including that of Spain which thus voted like every other country represented. They are to be found in the European Social Charter approved by the Council of Europe on 18 October 1961. They are to be found in the relevant international labour Conventions and in particular in the Freedom of Association and Protection of the Right to Organize Convention, 1948, now ratified by 77 States, and the Right to Organize and Collective Bargaining Convention, 1949, now ratified by 89 States. No State is bound contractually by any of these standards unless it has ratified the appropriate instrument, but no State can escape comparison with them and evaluation of the measure of freedom which it secures to its people on the basis of comparison. Nor can the comparison be limited to the formal conformity of the law with world standards; the test is how far they are observed in fact.

In such conclusions the legal theoretician is bound to find cause for reflection. Beyond that, the report's detailed description of Spanish labor law

<sup>11</sup> For a listing of recent ILO documents, see 53 Official Bulletin, No. 1 at 53 (1970).

and practice in their historical context would be of the greatest value to any company operating in Spain, as well as to students of labor law in any country who appreciate the value of comparative study.

The ILO Group's sole concluding recommendation, "widespread diffusion and completely free discussion of the whole of our report throughout Spain and throughout the international trade union movement," might well be expanded to include the international legal community. Similarly widespread diffusion and free discussion might be recommended also for many other United Nations and specialized agency publications which at present are all too little known in the legal profession.

JOHN CAREY, *Chairman*

MILO G. COERPER

KY P. EWING, JR.

ARNOLD FRALEIGH

VACLAV MOSTECKY

E. RALPH PERKINS

STEPHEN C. SCHOTT

JACK GUMPERT WASSERMAN

ASSOCIATION OF STUDENT INTERNATIONAL LAW SOCIETIES  
THE PRESIDENT'S REPORT

A generous grant from the Henry R. Luce Foundation, continuing support from the American Society of International Law, and the outstanding work of the Association's first Executive Secretary, Jim Nafziger, together gave the Association this past school year a fresh vitality and expanded scope far beyond that generated during its first seven years, when, for the most part, the organization's program was necessarily limited to the sponsorship of the annual Philip C. Jessup International Law Moot Court Competition.

The 1969-70 Executive Committee was composed of William T. Adams (President), Lewis S. Greenwald (Vice President), Richard Speare (Administrative Secretary), Thomas Shillinglaw (Treasurer), and James A. R. Nafziger (Executive Secretary). At a meeting in August, 1969, the officers adopted a set of policies directed toward the strengthening of existing programs, and the development of new ones. The key elements of the guiding policies were centralization and consolidation, relevancy and responsiveness, innovation, and internationalization.

*Centralization and Consolidation*

Until this year, the Association was engaged in a sort of interstate commerce which found the student officers and organization files both widely scattered. Indeed, a tribute should be paid to past officers for overcoming the serious handicaps of both decentralization and penury. This year's centralization of almost all administrative and communicative functions of the Association at Tillar House in Washington was particularly productive in greatly enhancing the exchange and utilization of ideas and personal talents both among member societies and between them and the Association headquarters. The Association's bank account, converted during the year from a small deficit to a balance of \$1,234.00, was established at the Riggs National Bank in Washington.

A program embracing both membership recruitment and the propagation of new societies was undertaken, primarily by means of periodic mailings to domestic law schools, but also by personal visits and correspondence from the officers, members, and friends of the Association. The Executive and Administrative Secretaries both completed field trips during which they spoke with the officers and constituents of several member societies, recruited new member societies, and encouraged the development of new ones. Mention should be made of contacts made by the Executive Committee with New Orleans schools during the Committee's autumn meeting in that city. The results have been: first, the addition of nine new member societies, for a total number of 41; second, the receipt since the 1970 annual meeting of membership applications from three additional societies,

including two in the New Orleans-Baton Rouge area; third, through the encouragement of the Association, the organization of five new societies of international law. Finally, it should be noted that the officers of the Association, continuing past policy, have sought to interest groups of students outside of law schools in the activities of the Association. Such groups included graduate-level international relations clubs at The Johns Hopkins School of Advanced International Studies and at the New School for Social Research.

The new member societies are: Albany Law School International Law Society, Boston University International Law Club, Boalt School of Law International Law Society (California-Berkeley), Ralph Bunche Society of International Law (California-Davis), Emory International Law Society, Georgia Society of International and Comparative Law, San Diego International Law Society, Washburn International Law Society, and Wayne State International Law Society.

Special procedures for dealing with delinquent and dormant members were articulated and implemented, while at the same time assistance and advice were given to three societies which were experiencing special problems of growth and survival. In one case a moribund member was revived—primarily through numerous personal visits and communications—becoming a thriving society with a second semester full of programs.

The tenth annual Philip C. Jessup International Law Moot Court Competition, after the withdrawal of several teams, included over sixty teams from five countries (Argentina, Canada, France, United Kingdom, and United States), approximately 70% more than the number entered in the 1969 rounds. The competition concerned a hypothetical case coming before the International Court of Justice (*United States v. Amazonia*) involving questions of expropriation, jurisdiction, retaliation, and international organization law. The semifinal and final rounds were held April 22–26 at the Columbia Law School and Waldorf-Astoria Hotel in New York.

The University of Miami won the competition, and the University of Kentucky was runner-up. Carson P. Porter of the University of Kentucky was declared the best oralist in the final round, and Alvin Entin of the University of Miami the best oralist in the semifinal rounds. The University of Miami won the award for the submission of the best written memorials. Members of the Moot Court for the final round were Judge Philip C. Jessup, formerly of the International Court of Justice (President); Dr. F. V. García-Amador, Director, Department of Legal Affairs, Organization of American States; and Professor Clive Parry of Cambridge University. Over 250 students participated in the competition and about 200 judges, teachers of law, and practicing lawyers served as judges. Improvements in the competition this year included a thorough revision of the rules after the Executive Committee's review of comments from past participants and other contributors; a greater uniformity among the several regionals; and greater recognition of successful participants by means of awarding trophies and certificates at all levels of the competition.

### *Relevancy and Responsiveness*

The most pressing concern of the Executive Committee throughout the year was that of best utilizing its new assets for the benefit of a diverse membership. The relevancy and responsiveness of Association programs is critical. Indeed, in view of student concern in respect of the rôle of nation-states in troubled areas such as Indochina and the Middle East, it is natural to expect that the increasingly activist spirit of member societies will encourage the continuing development of relevant, "active" programs by the Association.

In early autumn, as an initial step toward the development of relevant and responsive activities, a comprehensive, nine-page questionnaire, designed to elicit a broad range of information concerning the perceptions, programs, plans, problems, needs, and ideas of member societies, was distributed to all member societies. The results of this questionnaire, to which most societies contributed, were analyzed, summarized, and recorded for use by the member societies and the officers of the Association. The Executive Committee concluded from the responses to the questionnaire that the primary functions which the Association might reasonably perform within the near future are: (1) information gathering and dissemination; (2) constructive assistance to self-help efforts by member societies, new societies, international journals, and related organizations toward the development of their institutional structures, local programs, publications, and the like; and (3) sponsorship of relevant organization-wide programs, services and co-operative activities. On the basis of this report the membership decided to revise the questionnaire annually, and to make its annual completion mandatory for all member societies.

### *Innovation*

Besides reviewing every existing program, the Association broke new ground this past year in several areas. New programs and services included the distribution of a bimonthly *Letter to Members*; a revision of the Manual for Student Societies, which sketches model patterns of organization and programs of activity; support for the preparation and distribution by the Stanford Society of a current and reliable list of employment opportunities in the field of international law; a program initiated by the *Case-Western Reserve Journal of International Law* to co-ordinate and enhance the co-operation among student international law journals (of which there currently are fourteen, with three more journals scheduled for publication soon); the collection and dissemination of program information for the benefit of member societies on the availability of films and film rental services; a limited distribution of information on fellowships and educational opportunities in the field of international law; the distribution of the questionnaire mentioned earlier; and the development of closer ties with related organizations, such as the American Bar Association Law Student Division and the Young Lawyers Committee of the ABA Section on

International and Comparative Law, of which the Executive Secretary was a member.

Several proposals for new activities, sponsored and co-ordinated by the Association, were approved at the 1970 Annual Meeting. These include a program of reduced travel rates for law students traveling abroad; an Association-wide program, suggested by the Harvard Society and built upon their own program, for co-ordinating a summer foreign-employment program for United States law students, beginning during the 1970-71 school year and open to constituents of member societies; and the preparation of a manual for editors of student international law journals, to supplement the rather limited guidance provided by the Uniform Book of Citations.

Finally, specific mention should be made of the first annual International Law Journal Workshop, which was held in conjunction with the annual meeting in April, at which fourteen student international law journals or journals-to-be were represented. A very lively, wide-ranging and worthwhile discussion ensued, during which detailed information was exchanged on the solution of mutual problems, such as the existing and optimal relationships between an international journal and its parent international law society; the relationship between the journal and, respectively, the school administration and the school's standard law journal; and areas of possible co-operation among the journals. The editors agreed to exchange table of contents galley proofs, to assist in the publication of a manual for editors, and to request the continued distribution to the journals of the Association's *Letter to Members*. The proceedings of the workshop will be available for distribution by early winter.

#### *Internationalization*

Since the initial participation of foreign teams in the Jessup Competition in 1969, the "internationalization" of the Association's activities has been of special concern. Some tangible consequences have resulted. The participation of a French team in the competition has led to the development of a French Association of Student International Law Societies, patterned on the A.S.I.L.S. The Association has also assisted in the development of a moot court competition within the political science department of a Canadian university. All 1970 materials and some additional ideas for conducting the competition were sent to the school pursuant to its request, and the Association was informed in December that the competition had been successfully organized.

Aside from the internationalization of the Association's activities associated with the Jessup Competition, several other "internationalizing" activities are under way. At the journal workshop in April, the Cornell and Case-Western Reserve journals offered to publish high-quality student material from sources outside their own law schools, including material written by students in foreign countries. Accordingly, the Association is sending a copy of these journals and guidance on the format of U. S. law journals



to an interested French law student, who will make the material available to other students at the University of Paris.

As a concluding personal note, I should like to express my appreciation for the assistance I have enjoyed during this most important year of the Association's growth. Special thanks are due Jim Nafziger, with whom I had almost daily contact during the year, for his outstanding contributions to the Association in the job most crucial to the Association and its growth. It was a genuine pleasure working with him and the other student officers, who lent their imagination and experience in shaping organizational policy, as well as with the American Society of International Law, which co-operated in furthering the Association's goals toward the education and interest of students in the field of international law.

Respectfully submitted,

WILLIAM T. ADAMS  
*President, 1969-1970*

OFFICERS  
OF THE  
AMERICAN SOCIETY OF INTERNATIONAL LAW  
FOR THE YEAR 1970-1971

PRESIDENT

HAROLD D. LASSWELL

HONORARY PRESIDENT

PHILIP C. JESSUP

VICE PRESIDENT AND EXECUTIVE DIRECTOR: STEPHEN M. SCHWEBEL

HONORARY VICE PRESIDENTS

DEAN G. ACHESON  
WILLIAM W. BISHOP, JR.  
HERBERT W. BRIGGS  
ARTHUR H. DEAN  
HARDY C. DILLARD  
CHARLES C. FENWICK  
GREEN H. HACKWORTH  
JAMES N. HYDE

HANS KELSEN  
BRUNSON MACCHESNEY  
CHARLES E. MARTIN  
MYRES S. McDOUGAL  
OSCAR SCHACHTER  
JOHN R. STEVENSON  
ROBERT R. WILSON  
QUINCY WRIGHT

VICE PRESIDENTS

RICHARD A. FALK

COVEY T. OLIVER

WILLIAM D. ROGERS

SECRETARY

EDWARD DUMBAULD

TREASURER

FRANZ M. OPPENHEIMER

ASSISTANT TREASURER

JAMES C. CONNER

EXECUTIVE COUNCIL

TO SERVE UNTIL 1971

DAVID M. GOODER, Illinois  
IVAN L. HEAD, Canada  
RUTH C. LAWSON, Massachusetts  
CARLYLE E. MAW, New York

PAUL O. PROEHL, California  
EDWARD D. RE, New York  
NORBERT A. SCHLEI, California  
L. H. VAN DUSEN, JR., Pennsylvania

TO SERVE UNTIL 1972

GEORGE H. ALDRICH, D. C.  
WILLIAM CONANT BREWER, JR., Massachusetts  
A. BROCHES, D. C.  
JOHN CAREY, New York

RICHARD B. LILlich, Virginia  
SAUL MENDLOVITZ, Massachusetts  
VED P. NANDA, Colorado  
ROBERT W. TUCKER, Maryland

TO SERVE UNTIL 1973

RICHARD R. BAXTER, Massachusetts  
ADRIAN S. FISHER, D. C.  
JOHN B. HOWARD, New York  
MONROE LEIGH, D. C.

JOHN E. LESLIE, New York  
HOWARD S. LEVIE, Missouri  
PETER D. TROBOFF, D. C.  
BURNS H. WESTON, Iowa

EXECUTIVE COMMITTEE

RICHARD R. BAXTER, Massachusetts  
RICHARD A. FALK, New Jersey  
HAROLD D. LASSWELL, *ex officio*,  
Connecticut  
MONROE LEIGH, D. C.  
CARLYLE E. MAW, New York

COVEY T. OLIVER, Pennsylvania  
FRANZ M. OPPENHEIMER, *ex officio*, D. C.  
WILLIAM D. ROGERS, D. C.  
OSCAR SCHACHTER, New York  
STEPHEN M. SCHWEBEL, *ex officio*, D. C.

EDITORIAL BOARD  
AMERICAN JOURNAL OF INTERNATIONAL LAW

RICHARD R. BAXTER, Editor-in-Chief

HONORARY EDITORS.

HERBERT W. BRIGGS	HANS KELSEN
HARDY C. DILLARD	JOSEF L. KUNZ *
CHARLES G. FENWICK	PITMAN B. POTTER
LEO GROSS	JOHN B. WHITTON
PHILIP C. JESSUP	ROBERT R. WILSON

QUINCY WRIGHT

EDITORS

WILLIAM W. BISHOP, JR.	OLIVER J. LISSITZYN
JOHN CAREY	BRUNSON MACCHESNEY
ALONA E. EVANS	MYRES S. McDUGAL
RICHARD A. FALK	STANLEY D. METZGER
ALWYN V. FREEMAN	COVEY T. OLIVER
WOLFGANG FRIEDMANN	STEFAN A. RIESENFELD
JOHN N. HAZARD	OSCAR SCHACHTER
LOUIS HENKIN	STEPHEN M. SCHWEBEL
JAMES N. HYDE	LOUIS B. SOHN
RICHARD B. LILICH	ERIC STEIN

RICHARD YOUNG

ELEANOR H. FINCH, Assistant Editor

ROSEMARY G. CONLEY, Editorial Assistant

INTERNATIONAL LEGAL MATERIALS

MARLOU M. RIGHINI, Editor

EDITORIAL ADVISORY COMMITTEE

STEPHEN M. SCHWEBEL, Chairman	GEORGES R. DELAUME
PHILIP W. AMRAM	STANLEY D. METZGER
CHARLES I. BEVANS	ARTHUR S. MILLER
HELEN L. CLAGETT	WALTER STERLING SURREY

LILLIAN C. ROBERTS, Secretary

COMMITTEES OF THE SOCIETY

*Nominating Committee:* Benjamin Forman, Chairman; Donald E. Claudy, Alona E. Evans, Isaac N. P. Stokes, Howard J. Taubenfeld.

*Committee on Annual Awards:* Myres S. McDougal, Chairman; L. F. E. Goldie, Brunson MacChesney.

*Committee on the Annual Meeting:* John Norton Moore, Chairman.

*Committee on the Budget:* Monroe Leigh, Chairman; James C. Conner, George C. Denney, Jr., Thomas L. Farmer, John P. Furman, George A. Tesoro.

*Committee on Corporate Membership:* Carlyle E. Maw, Chairman; F. Aley Allen, Peter A. Bator, Loftus E. Becker, Mitchell Brock, Alexander D. Calhoun, Jr., Max Chopnick, Alexis C. Coudert, Frank P. Davidson, Robert Eikel, R. Keith Kane, Tom Killefer, Norman M. Littell, Breck P. McAllister, David E. McGiffert, George M. Pavia, Sigmund A. Timberg.

*Committee on Finance and Endowment:* Arthur H. Dean, Eli Whitney Debevoise, John B. Howard, James N. Hyde, Carlyle E. Maw, H. C. L. Merillat.

\* Deceased August 5, 1970.

*Committee on Governance:* Richard R. Baxter, Chairman; José A. Cabranes, Michael H. Cardozo, John Carey, Lawrence H. deBivort, Richard A. Falk, Tom J. Farer, John B. Howard, James N. Hyde, Ruth C. Lawson, Monroe Leigh, Richard B. Lillich, John Norton Moore, Ved P. Nanda, Walter Sterling Surrey, Burns H. Weston.

*Committee on the Library:* Michael H. Cardozo, Chairman; Isadore G. Alk, Georges R. DeLaume, H. Alberta Colclaser, John Maktos, Marian Nash, Kurt Schwerin, Lisbeth Stevens, Don Wallace, Jr.

*Committee on the Manley O. Hudson Medal:* Ralph G. Albrecht, Chairman; R. R. Baxter, Herbert W. Briggs, John N. Hazard, Oscar Schachter.

*Committee on Membership:* Paul O. Proehl, Chairman; Neill H. Alford, Jr., Harry H. Almond, Homer G. Angelo, Manuel R. Angulo, Hans W. Baade, Dana C. Backus, Gordon B. Baldwin, William S. Barnes, M. Cherif Bassiouni, Terence H. Benbow, Charles I. Bevans, Richard B. Bilder, Stephen M. Boyd, Adda B. Bozeman, William T. Burke, Daniel S. Cheever, Brownlee S. Corrin, Alona E. Evans, Lawrence S. Finkelstein, Edwin B. Firmage, Carlos Fligler, Albert H. Garretson, Stephen Gorove, Egon Guttman, Eliot D. Hawkins, Peter H. Hay, Albert M. Herrmann, Frederick Hess, Keith Highet, H. B. Jacobini, Kenneth L. Karst, Robert Layton, Peter B. Maggs, Harold G. Maier, Lawrence C. McQuade, Cyril C. Means, Jr., Robert A. Meyer, Richard S. Miller, James M. Nabrit, Jr., Andrew W. G. Newburg, Richard C. Pugh, Leigh S. Ratiner, Stuart W. Robinson, Jr., Robert Rosenstock, Arthur W. Rovine, Jerome J. Shestack, Henry J. Steiner, Robin Trevor Tait.

*Committee on Publications of the Department of State and the United Nations:* John Carey, Chairman; Milo G. Coerper, Ky P. Ewing, Arnold Fraleigh, E. Ralph Perkins, Stephen C. Schott.

*Committee on Regional and Local Activities:* Burns H. Weston, Chairman; Homer G. Angelo, John J. Barceló III, Richard B. Bilder, Rosalyn Higgins, S. Houston Lay, Richard B. Lillich, John F. Murphy, Ved P. Nanda, Sidney I. Picker, Jr., C. Neale Ronning, Alfred P. Rubin, E. Blythe Stason, Jr., Griffith Way, Seymour W. Wurfel.

*Committee on Selection of Honorary Members:* Charles G. Fenwick, Chairman; John G. Laylin, Gurdon W. Wattles.

*Committee on Student and Professional Development:* Harold D. Lasswell, Chairman; Michael Barkun, Richard B. Bilder, José A. Cabranes, Mary Ellen Caldwell, Michael H. Cardozo, David R. Deener, Richard W. Edwards, Jr., John Hanessian, John Lawrence Hargrove, John B. Howard, H. B. Jacobini, Jack P. Jefferies, Saul H. Mendlovitz, H. C. L. Merillat, James A. R. Nafziger, Ved P. Nanda, W. Michael Reisman, Stephen M. Schwebel, Robert J. Steelman, Peter D. Trooboff.

*Committee on Tillar House:* Harry LeRoy Jones, Chairman; John A. King, James O. Murdock, Seymour Rubin.

*Committee on Transnational and Interdisciplinary Co-operation:* Oscar Schachter, Chairman; Paolo Contini, William D. Coplin, T. O. Elias, John N. Hazard, Rosalyn Higgins, F. V. García-Amador, Saul H. Mendlovitz, Shigeru Oda, Peter H. Rohn, Lyman M. Tondel.

## BOARD OF REVIEW AND DEVELOPMENT

ELTING ARNOLD  
 R. R. BAXTER, *ex officio*  
 KARL W. DEUTSCH  
 ISAIAH FRANK  
 EDMUND A. GULLION  
 ROSALYN HIGGINS  
 HAROLD D. LASSWELL, *ex officio*  
 JOHN M. LETICHE  
 SOL M. LINOWITZ  
 OLIVER J. LISSITZYN

JOHN NORTON MOORE  
 COVEY T. OLIVER  
 ROBERT E. OSGOOD  
 WILLIAM D. ROGERS  
 OSCAR SCHACHTER, *ex officio*  
 STEPHEN M. SCHWEBEL, *ex officio*  
 LOUIS B. SOHN  
 ERIC STEIN  
 JOHN R. STEVENSON, *ex officio*  
 WALTER STERLING SURREY

## PANEL MEMBERS

*Capital Formation and Securities Regulation:* John R. Stevenson, Chairman; Robert L. Knauss, Rapporteur; Homer G. Angelo, Elting Arnold, Peter A. Bator, Daniel H. Brill, Manuel F. Cohen, Paul A. Conley, Roger Dagon, Eli Whitney Debevoise, George T. Frampton, Egon Guttman, Eric H. Hager, Patrick Heininger, Yves-André Istel, Richard W. Jennings, Hugh Knowlton, Harvey M. Krueger, John E. Leslie, Louis Loss, Harold G. Maier, Carlyle E. Maw, Morris Mendelson, John G. Mott, Robert H. Mundheim, Lester Nurick, Scott E. Pardee, J. Charles Partee, Bert S. Prunty, Jr., Allan R. Roth, David S. Ruder, R. Duane Saunders, William J. Schrenk, Jr., Ira O. Scott, Jr., W. Arthur Stimpson, Arthur R. Taylor, Vance van Dine, John C. Vincent, Jr.

*China and International Order:* Jerome A. Cohen, Chairman-Rapporteur; George H. Aldrich, A. Doak Barnett, William E. Butler, Hungdah Chiu, George C. Denney, Jr., Alexander Eckstein, Richard A. Falk, Benjamin Forman, George Ginsburgs, William H. Gleysteen, John N. Hazard, James C. Hsiung, Douglas M. Johnston, Paul H. Kreisberg, Leon Lipson, Oliver J. Lissitzyn, Lucian W. Pye, Allen S. Whiting.

*Codification and Progressive Development of International Law:* Richard R. Baxter, Chairman-Rapporteur; Herbert W. Briggs, F. V. García-Amador, Richard B. Lillich, Edward McWhinney, Louis B. Sohn.

*Communication and Linguistics:* Harold D. Lasswell, Chairman; Peter J. Liacouras, Rapporteur; Layman E. Allen, Elting Arnold, Hardy C. Dillard, Joseph M. Goldsen, Eric H. Hager, Fred C. Iklé, Franz M. Oppenheimer, Oscar Schachter, Walter Sterling Surrey, Allen E. Throop.

*Inter-American Legal Questions:* Covey T. Oliver, Chairman; William S. Barnes, Rapporteur; Arthur R. Albrecht, Elting Arnold, Lyon L. Brinsmade, Henry P. de Vries, Eliezer Erel, Thomas L. Farmer, Mark B. Feldman, Charles G. Fenwick, John H. Jackson, Richard D. Kearney, Andreas F. Lowenfeld, William D. Rogers, David Spencer, Henry J. Steiner, Justin Sweet, Donald Wallace, Jr., Harry K. Wright.

*International Law and Humanitarian Problems:* C. Clyde Ferguson, Jr., Chairman; Gidon Gottlieb, Rapporteur; George H. Aldrich, D. W. Caulfield, Dale S. de Haan, Benjamin Forman, Jacques Freymond, Edvard Hambro, Martin Hill, Charles W. Havens, III, Edward M. Kennedy, Henry R. Labouisse, Howard S. Levie, Saul Mendlovitz, Claude Pilloud, W. Michael Reisman, Alfred P. Rubin, Oscar Schachter, Stephen C. Schott, Abba P. Schwartz, Simon Segal, Frank A. Sieverts, Edward E. Swanstrom, Peter D. Trooboff, Robert K. Woetzel, Ralph Zacklin.

*International Monetary Policy:* Stanley S. Surrey, Chairman; Michael Bradfield, Rapporteur; W. Bruce Bassett, Francis M. Bator, Roy Blough, David E. Bodner, Abram Chayes, Richard N. Cooper, William B. Dale, Edward R. Fried, Richard N. Gardner, Edward S. Guy, Hendrik S. Houthakker, Alexandre Kafka, Peter B. Kenen, Robert H. Knight, John M. Letiche, Cynthia C. Lichtenstein, Andreas F. Lowenfeld, Ansel F. Luxford, Stephen N. Marris, Lawrence C. McQuade, John Rhinelander, Walter S. Salant, Frank W. Schiff, Fred B. Smith, Robert Solomon, Walter Sterling Surrey, André van Campenhout, Thomas D. Willett, Alan W. Wolff.

*International Movement of National Art Treasures:* William D. Rogers, Chairman; Paul M. Bator, Rapporteur; Ralph G. Albrecht, Elizabeth Benson, Ronald Bettauer,

J. O. Brew, Clemency H. Coggins, Dudley T. Easby, Gordon Ekholm, Gilbert F. Edelson, André Emmerich, Clifford Evans, Ernest R. Feidler, Mark B. Feldman, Ashton Hawkins, L. Ward Hamilton, Jay C. Leff, Robert MacCrate, Robert B. Orr, Peter G. Powers, Charles Rozaire, Samuel R. Stern.

*International Telecommunications Policy:* Abram Chayes, Chairman; Leonard M. Chazen, Rapporteur; Charles D. Cook, Charles Dalfen, Thomas Ehrlich, Asher H. Ende, Samuel D. Estep, Richard N. Gardner, Joseph M. Goldsen, Allan Gotlieb, Sanford M. Jaffe, Leland L. Johnson, Paul L. Laskin, Monroe Leigh, David M. Leive, Maurice Levy, Frank E. Loy, Eugene B. Skolnikoff, Dallas Smythe, Erik N. Valters, Maurice Wolf.

*Law of the Sea:* Milton Katz, Chairman; Carl A. Auerbach, Burdick H. Brittin, William T. Burke, William E. Butler, John P. Craven, Robert B. Ellert, Northcutt Ely, Luke W. Finlay, L. F. E. Goldie, Edmund A. Gullion, A. R. Hadden, H. Field Haviland, Jr., Louis Henkin, Ann Hollick, Robert B. Krueger, John G. Laylin, Carlyle E. Maw, Myres S. McDougal, Mitchell Melich, Robert Neuman, Edgar L. Newhouse, Dennis M. O'Connor, Bernard H. Oxman, Claiborne Pell, Leigh Ratiner, Richard Young.

*Law of Treaties:* Oliver J. Lissitzyn, Chairman; Charles I. Bevans, Herbert W. Briggs, Robert E. Dalton, Francis Deak, Eberhard P. Deutsch, Albert H. Garretson, Stephen L. Gibson, Jack N. Goldklang, David M. Gooder, G. W. Haight, John Lawrence Hargrove, James F. Hogg, Richard D. Kearney, John G. Laylin, Myres S. McDougal, Eleanor C. McDowell, Dennis M. O'Connor, Herbert K. Reis, Stefan A. Riesenfeld, Egon Schwelb, Eric Stein, Joseph M. Sweeney, Frank M. Wozencraft.

*Nuclear Energy and World Order:* Bennett Boskey, Chairman; Mason Willrich, Rapporteur; Bernhard G. Bechhoefer, Robert R. Bowie, George Bunn, Joseph I. Coffey, John T. Conway, Richard A. Falk, Sam J. Farmer, Adrian S. Fisher, Victor Gillinsky, Rayburn D. Hanzlick, Allen M. Labowitz, Franklin A. Long, Henry Myers, John C. Palfrey, Jaroslav G. Polach, George W. Rathjens, Leonard S. Rodberg, Matthew Sands, Lawrence Scheinman, Herbert Scoville, Louis B. Sohn, Paul C. Szasz, Theodore B. Taylor, Alvin M. Weinberg, Christopher Wright.

*Ocean Data Acquisition Systems:* Albert H. Garretson, Louis Georgantas, L. F. E. Goldie, Clarence Hallberg, Nicholas Healy, Lawrence C. Jarret, Dennis M. O'Connor, Bernard H. Oxman, Gordon Paulsen, Leigh Ratiner, Joseph C. Sweeney, Daniel Wilkes, Christopher Wright.

*Regional Integration:* Stefan A. Riesenfeld, Chairman; Joseph S. Nye, Rapporteur; Richard L. Abbott, Carlos Alurralde, Michael D. Buttermann, Jared Carter, Kenneth W. Dam, Sidney Dell, John L. A. de Passalacqua, James H. Duffy, John W. Evans, Isaiah Frank, F. V. García-Amador, Peter Hay, Georges Landau, Ruth C. Lawson, Linda Lee, John M. Letiche, Raymond F. Mikesell, Covey T. Oliver, Philip Schmitter, Eric Stein, Luciano Tomassini.

*Regulation of International Trade:* Stanley D. Metzger, Chairman-Rapporteur; Hans W. Baade, Harold J. Berman, John Bodner, Kenneth W. Dam, Richard I. Fine, Isaiah Frank, Kazimierz Grzybowski, John H. Jackson, Luke T. Lee, Monroe Leigh, Andreas Lowenfeld, Sidney I. Picker, Jr., Edwin F. Rains, John B. Rehm, Stefan A. Riesenfeld, Philippe Schreiber, Eric Stein, Henry J. Steiner, Walter S. Surrey, Herman Walker, Donald Wallace, Jr., James K. Weeks, Robert R. Wilson.

*Reprisals in International Law:* Alwyn V. Freeman, Chairman; Robert W. Tucker, Rapporteur; Gordon B. Baldwin, Derek Bowett, Carl Q. Christol, Henry G. Darwin, Salo Engel, Morris Greenspan, John Lawrence Hargrove, Howard S. Levie, Richard B. Lillich, Pritan T. Merani, Ved P. Nanda, John C. Novogrod, E. M. Overby, Nicholas Onuf, Davis R. Robinson, Jerome H. Silber, Andre Sassoon, Jimmie Lee Sterling, J. Larry Taulbee, Paul C. Warnke, Burns H. Weston.

*Rôle of International Law in Civil Wars:* Wolfgang Friedmann, Chairman; John Norton Moore, Rapporteur; Richard J. Barnet, Thomas Ehrlich, Richard A. Falk, Tom J. Farer, Edwin B. Firmage, G. W. Haight, Eliot D. Hawkins, Brunson MacChesney, Myres S. McDougal, Louis B. Sohn, Charles M. Spofford, Howard J. Taubenfeld, Lawrence R. Velvel, Burns H. Weston.

*Rôle of International Law in Government Decision-Making in War-Peace Crises:* Roger D. Fisher, Chairman-Rapporteur; Richard B. Bilder, Abram Chayes, Richard A. Falk, Adrian S. Fisher, Benjamin Forman, Gidon Gottlieb, Louis Henkin, Edwin C. Hoyt, Jr., Hans A. Linde, Andreas F. Lowenfeld, Lee R. Marks, Franz M. Oppenheimer, David S. Smith, Peter Solbert, John R. Stevenson.

*Science and International Law:* Oscar Schachter, Chairman; Harry H. Almond, Jr., Gordon A. Christenson, Joseph M. Goldsen, Harold D. Lasswell, Dennis Livingston, Howard J. Taubenfeld, Mason Willrich.

*Self-Determination:* Rupert Emerson, Chairman; Sir Kenneth Bailey, Henry G. Darwin, George C. Denney, Jr., Tom J. Farer, Clarence Clyde Ferguson, Jr., Roger D. Fisher, Arnold Fraleigh, Leo Gross, John Lawrence Hargrove, H. Field Haviland, Jr., Hans Kohn, Arthur Lall, Harold D. Lasswell, Charles Burton Marshall, Donald F. McHenry, Thomas Mensah, Stanley D. Metzger, Charles R. Nixon, Hisashi Owada, Herbert K. Reis, Robert B. Rosenstock, Oscar Schachter, Egon Schwelb, Richard N. Swift, Vernon Van Dyke, Francis Vendrell, Immanuel Wallerstein.

*State Succession:* Oliver J. Lissitzyn, Chairman-Rapporteur; Charles I. Bevans, Herbert W. Briggs, Benjamin V. Cohen, Robert E. Dalton, Albert J. Esgain, A. A. Fatouros, Thomas M. Franck, Alwyn V. Freeman, George Ginsburgs, James F. Hogg, Richard D. Kearney, Gerard V. J. LaForest, Hugh J. Lawford, Jonathan Mallamud, Myres S. McDougal, H. C. L. Merrilat, Dennis M. O'Connor, Cecil J. Olmstead, Richard G. Powell, John M. Raymond, Stefan A. Riesenfeld, Charles Runyon, Oscar Schachter, John H. Spencer, Joseph M. Sweeney.

## AN ACT

## TO INCORPORATE THE AMERICAN SOCIETY OF INTERNATIONAL LAW, AND FOR OTHER PURPOSES

(P. L. 794, 81st Cong., Ch. 958, 2d Sess. [H.R. 7990], 64 Stat. 869)

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the following persons, citizens of the United States and members of the executive council of the unincorporated association known as the American Society of International Law, to wit: Manley O. Hudson, of Cambridge, Massachusetts, president of the said society; Dean G. Acheson, of Washington, District of Columbia, honorary president of the same; George A. Finch, of Chevy Chase, Maryland; Edwin D. Dickinson, of Philadelphia, Pennsylvania; and Philip C. Jessup, of New York, New York; vice presidents of the same; Philip Marshall Brown, of Washington, District of Columbia; Frederic R. Coudert, of New York, New York; William C. Dennis, of Richmond, Indiana; Charles G. Fenwick, of Washington, District of Columbia; Cordell Hull, of Washington, District of Columbia; Charles Cheney Hyde, of New York, New York; Robert H. Jackson, of McLean, Virginia; Arthur K. Kuhn, of New York, New York; George C. Marshall, of Leesburg, Virginia; Henry L. Stimson, of New York, New York; Elbert D. Thomas, of Salt Lake City, Utah; Charles Warren, of Washington, District of Columbia; George Grafton Wilson, of Cambridge, Massachusetts; and Lester H. Woolsey, of Chevy Chase, Maryland; honorary vice presidents of the said society; Edward Dumbauld, of Uniontown, Pennsylvania, secretary; and Edgar Turlington, of Chevy Chase, Maryland, treasurer of the same; Edward W. Allen, of Seattle, Washington; Mary Agnes Brown, of Washington, District of Columbia; Florence Brush, of Bronxville, New York; Kenneth S. Carlston, of Urbana, Illinois; Ben M. Cherrington, of Denver, Colorado; Percy E. Corbett, of New Haven, Connecticut; Willard B. Cowles, of Lincoln, Nebraska; William S. Culbertson, of Washington, District of Columbia; John S. Dickey, of Hanover, New Hampshire; Alwyn V. Freeman, of Los Angeles, California; Ernest A. Gross, of Manhasset, New York; Stanley K. Hornbeck, of Washington, District of Columbia; A. Brunson MacChesney, of Chicago, Illinois; William Manger, of Washington, District of Columbia; Charles E. Martin, of Seattle, Washington; John Brown Mason, of Oberlin, Ohio; Myres S. McDougal, of New Haven, Connecticut; Hans J. Morgenthau, of Chicago, Illinois; Durward V. Sandifer, of Chevy Chase, Maryland; Francis B. Sayre, of Washington, District of Columbia; Carl B. Spaeth, of Palo Alto, California; Robert B. Stewart, of Medford, Massachusetts; and Albert C. F. Westphal, of Albuquerque, New Mexico; and such other persons as are now members of the said society, and their successors, are hereby created and declared to be a body corporate, by the name of The American Society of International Law.



## PURPOSES

SEC. 2. The purposes of the corporation are and shall be to foster the study of international law and to promote the establishment and maintenance of international relations on the basis of law and justice. The corporation shall not be operated for profit, and no part of its income or assets shall inure to any of its members, or its officers or other members of its executive council, or be distributable thereto otherwise than upon dissolution or final liquidation of the corporation. The corporation, and its officers and other members of its executive council shall not, as such, contribute to or otherwise support or assist any political party or candidate for elective public office.

## EXECUTIVE COUNCIL AND OFFICERS

SEC. 3. The governing board of the corporation, subject to the directions of the corporation at its annual meetings and at such other meetings as may be called pursuant to the provisions of its constitution, bylaws, and regulations, hereinafter mentioned, shall be an executive council consisting of a president, an honorary president, a number of vice presidents and honorary vice presidents to be determined by the constitution of the corporation, a secretary, a treasurer, and not less than twenty-four additional persons. The officers of the corporation and one-third of the other members of the executive council shall be elected at each annual meeting of the corporation: *Provided, however,* That the executive council may be authorized by the constitution of the corporation to elect the secretary and the treasurer of the corporation for specified terms and to fill vacancies until the next annual meeting of the corporation. The number of members of the executive council shall initially be forty-four, and the members of the said council shall initially be the persons whose names and addresses are set forth in section 1 hereof.

## PRINCIPAL OFFICE AND ACTIVITIES

SEC. 4. The corporation shall have its principal office in the District of Columbia and shall have the right to conduct its activities in the said District and at any other place or places in the United States.

## CORPORATE SUCCESSION AND POWERS

SEC. 5. The corporation shall have succession by its corporate name and shall have power to sue and be sued, complain and defend in any court of competent jurisdiction; to adopt, use, and alter a corporate seal; to choose such officers, managers, and agents as its business may require; to adopt, amend, apply, and administer a constitution, bylaws, and regulations, not inconsistent with the laws of the United States of America or any State in which the corporation is to operate, for the management of its property and the regulation of its affairs; to contract and be contracted with; to take and hold by lease, gift, purchase, grant, devise, or bequest, in full title, in trust, or otherwise, any property, real or personal, necessary for attaining the objects and carrying into effect the purposes of the corporation, subject,

however, to applicable provisions of law of any State (A) governing the amount or kind of real and personal property which may be held by, or (B) otherwise limiting or controlling the ownership of real and personal property by, a corporation operating in such State; to transfer and convey real or personal property; to borrow money for the purposes of the corporation, and issue bonds therefor, and secure the same by mortgage subject in every case to all applicable provisions of Federal or State laws; to publish a journal and other publications, and generally to do any and all such acts and things as may be necessary and proper in carrying into effect the purposes of the corporation.

#### LIABILITY FOR ACTS OF OFFICERS AND AGENTS; SERVICE OF PROCESS

SEC. 6. The corporation shall be liable for the acts of its officers and agents. It shall have in the District of Columbia at all times a designated agent authorized to accept service of process for the corporation; and notice to or service upon such agent, or mailed to the business address of such agent, shall be deemed notice to or service upon the corporation.

#### ISSUES OF STOCK, DECLARATION AND PAYMENT OF DIVIDENDS, LOANS TO OFFICERS AND MEMBERS OF EXECUTIVE COUNCIL PROHIBITED

SEC. 7. The corporation shall not issue shares of stock, nor declare or pay dividends, nor make loans or advances to its officers or members of its executive council or any of them. Any member of its executive council who votes for or assents to the making of a loan or advance to an officer of the corporation or to a member of its executive council, and any officer or officers participating in the making of any such loan or advance, shall be jointly and severally liable to the corporation for the amount of such loan or advance until the repayment thereof.

#### BOOKS AND RECORDS

SEC. 8. The corporation shall keep correct and complete books and records of account. It shall also keep minutes of the proceedings of its members, executive council, and committees having any of the authority of the said council. It shall also keep at its principal office a record giving the names and addresses of its members entitled to vote. All books and records of the corporation may be inspected by any member or his agent or attorney, for any proper purpose, at any reasonable time.

#### ANNUAL AUDIT

SEC. 9. There shall be an annual audit of the financial transactions of the corporation and of the pertinent books and records of the corporation by a certified public accountant, at the expense of the corporation, and the said audit shall be filed with the Congress.

#### DURATION

SEC. 10. The duration of the corporation shall be perpetual.

ACQUISITION OF ASSETS OF EXISTING AMERICAN SOCIETY OF INTERNATIONAL  
LAW

SEC. 11. The corporation may and shall acquire all of the assets of the existing unincorporated association known as the American Society of International Law, subject to any liabilities and obligations of the said association.

RESERVATION OF RIGHT TO ALTER, REPEAL, OR AMEND

SEC. 12. The right to alter, repeal, or amend this Act is hereby expressly reserved to Congress.

*Approved September 20, 1950.*

*Resolution Adopted by the American Society of International Law,  
a Corporation, at its Annual Meeting on April 28, 1951*

RESOLVED, That:

(a) The corporation accepts incorporation provided for in the Act of Congress approved September 20, 1950 (Pub. Law 794, 81st Congress, Chap. 958, 2d Session, 64 Stat. 869).

(b) The corporation adopts as its constitution, bylaws and regulations the constitution, bylaws and regulations of the American Society of International Law, an unincorporated association.

(c) The persons now serving as President, Honorary President, Vice Presidents, Honorary Vice Presidents, Secretary, Treasurer, Assistant Treasurer, Executive Secretary, and members of the Executive Council of the said unincorporated association shall serve in the same capacities on behalf of the corporation from the date of the said meeting until the expiration of the periods for which they were chosen by the said unincorporated association.

(d) The committees and employees of the unincorporated association shall become committees and employees of the corporation on the date of the transfer of the property and business of the association to the corporation.

(e) The corporation adopts as its seal the seal of the unincorporated association, with appropriate modifications.

(f) The corporation designates as its agent in the District of Columbia, to accept service of process for the corporation, William S. Culbertson, a member of the corporation residing at 2101 Connecticut Avenue, N. W.<sup>1</sup>

(g) The corporation authorizes Lester H. Woolsey and Charles G. Fenwick to accept for the corporation the property and business of the unincorporated association, subject to all liabilities and obligations of the association, and to execute and deliver any and all instruments which may be necessary or desirable in connection with the acceptance of the said property and business.<sup>2</sup>

<sup>1</sup> Deceased. The Executive Council on Nov. 18, 1967, designated the Executive Director of the Society as its agent to accept service of process.

<sup>2</sup> For documents and proceedings completing the incorporation of the Society, see PROCEEDINGS, 1951, pp. 195, 204-212.

CONSTITUTION  
OF  
THE AMERICAN SOCIETY OF INTERNATIONAL LAW<sup>1</sup>

(Adopted by the incorporated Society April 28, 1951;  
as amended to April 27, 1963)

---

ARTICLE I

*Name*

This Society shall be known as The American Society of International Law.

ARTICLE II

*Object or purpose*

The object of this Society is to foster the study of international law and to promote the establishment and maintenance of international relations on the basis of law and justice. For this purpose it will co-operate with similar societies in this and other countries.

ARTICLE III

*Membership*

New members may be elected by the Executive Council acting under such rules and regulations as it may prescribe.

*Annual Members.* Annual members may be divided into such classes and shall pay such dues as the Executive Council shall determine and shall thereupon become entitled to all privileges of the Society including copies of the *American Journal of International Law* issued during the year. Upon failure to pay dues for one year a member may in the discretion of the Executive Council be suspended or dropped from membership.

*Life Members.* Upon payment of such amount as the Executive Council shall determine, any person eligible for annual membership may be elected by the Executive Council a life member and shall be entitled to all the privileges of annual members.

*Members Emeriti.* Persons who shall have completed fifty years of membership in the Society may thereafter be declared by the Executive Council *members emeriti* and thereupon shall be entitled to all the privileges of the Society without payment of dues.

*Honorary Members.* Persons not citizens of the United States, who shall have rendered distinguished service to the cause which this Society is

<sup>1</sup> The history of the origin and organization of The American Society of International Law can be found in the PROCEEDINGS of the First Annual Meeting at p. 23. The original Constitution was adopted January 12, 1906.

formed to promote, may upon nomination of the Executive Council be elected to honorary membership by the Society. Only one honorary member may be elected in any one year. Such members have the full privileges of life membership but pay no dues.

*Corporate Non-Voting Members.* Upon payment of such annual dues as the Executive Council shall determine, corporations, partnerships, associations, and organizations of such other kinds as the Executive Council may designate, may be elected members of the Society without the privileges of voting or holding office but with all the other privileges of membership including receipt of the Society's publications.

*Additional Classes of Membership.* The Executive Council may establish additional classes of membership upon such terms and with such dues as it shall determine.

## ARTICLE IV

### *Officers*

The officers of the Society shall consist of an Honorary President, a President, such number of Honorary Vice Presidents as may be fixed from time to time by the Executive Council, four Vice Presidents, a Secretary and a Treasurer, all of whom shall be elected annually, but the President shall not be eligible for more than three consecutive annual terms.

The Secretary and the Treasurer shall be elected by the Executive Council. The Executive Council may appoint an Assistant Treasurer, who shall perform the duties of the Treasurer in the event of his absence or incapacity to act. All other officers shall be elected by the Society except as hereinafter provided for the filling of vacancies occurring between elections.

At every annual election candidates for all offices to be filled by the Society at such election shall be placed in nomination either by a motion signed by not less than ten members of the Society or by a Nominating Committee which shall consist of the five members receiving the highest number of ballots at the last session of the preceding annual meeting of the Society. Nominations for membership on the Committee may be made by the Executive Council or from the floor.

All officers shall be elected by a majority vote of the members present and voting at the annual meeting of the Society or other meeting called by the President for this purpose. All officers shall serve until their successors are chosen. The Council may fill vacancies until the next annual meeting of the Society.

## ARTICLE V

### *Duties of Officers*

The President shall preside at all meetings of the Society; shall appoint committees, except as otherwise determined by the Executive Council; and shall perform such other duties as the Executive Council may assign to him. The Executive Council may designate one of the Vice Presidents to serve as Executive Vice President, who shall have responsibility for general execu-

tive direction of the Society and shall perform such other duties as the Executive Council may assign him. In the absence of the President his duties shall devolve upon one of the Vice Presidents to be designated by the President, or, if there be no President, or if the President be unable to act, by the Executive Council.

The Secretary shall keep the records and conduct the correspondence of the Society and shall perform such other duties as may be assigned to him by the Society or by the Executive Council.

The Treasurer shall receive and have the custody of the funds of the Society and shall invest and disburse them subject to the rules and under the direction of the Executive Council. The fiscal year shall begin on the first day of April.

The officers shall perform the duties prescribed in Article VI or elsewhere in this Constitution.

## ARTICLE VI

### *The Executive Council*

There shall be an Executive Council herein termed the Council. The Council shall have charge of the general interests of the Society and shall possess the governing power except as otherwise specifically provided in this Constitution. The Council shall adopt regulations consistent with this Constitution, appropriate money, and have power to arrange for the issue of publications. The Council shall appoint committees in those cases in which it has reserved that power to itself.

The Council shall consist of the officers of the Society and twenty-four elected members whose terms of office shall be three years. Eight members shall be elected by the Society each year and the service of Council members shall begin at the meeting of the Council immediately following the meeting of the Society at which they were elected. The terms of office and the Council members already elected for those terms at the time this Constitution is revised shall continue unchanged. Elective members of the Council shall be eligible for re-election. Following service for two consecutive terms no elective member shall be eligible for re-election until at least one year after the expiration of his second consecutive term. The Council shall have power to fill vacancies in its membership occasioned by death, resignation, failure to elect, or for other causes. Such appointees shall hold office until the next annual election.

The President of the Society shall be the Chairman of the Council. In case of his absence the Council may elect a temporary chairman.

The Secretary of the Society shall be the Secretary of the Council. He shall keep the records and conduct the correspondence of the Council and shall perform such other duties as may be assigned to him by the Council.

Seven members shall constitute a quorum and a majority vote of those present shall be necessary for decisions.

Meetings of the Council shall be called by the Secretary on instructions of the President, or of a Vice President acting for the President, or upon the written request of seven members of the Council.

## ARTICLE VII

*Meetings*

Annual meetings of the Society shall be held at a time and place to be determined by the Executive Council. The chief purpose of the meetings is the presentation of papers, and discussions. The Society shall also elect officers and transact such other business as may be necessary.

Special meetings may be held at any time and place on the call of the Executive Council, or of the Secretary upon written request of thirty members. At least ten days' notice of a special meeting shall be given to each member of the Society by mail, such notice to specify the object of the meeting. No other business shall be transacted at such meetings unless admitted by a two-thirds vote of those present and voting.

Fifty members shall constitute a quorum at all meetings and a majority of those present and voting shall be necessary for decisions.

## ARTICLE VIII

*Resolutions*

All resolutions relating to the principles of international law or to international relations which shall be offered at any meeting of the Society shall, in the discretion of the presiding officer, or on the demand of three members, be referred to the appropriate committee or the Council, and no vote shall be taken until a report shall have been made thereon. Resolutions may be submitted for consideration by the Executive Council in advance of any meeting of the Society by depositing them with the Secretary in due time.

## ARTICLE IX

*Amendments*

This Constitution may be amended at any annual meeting of the Society by a two-thirds vote of the members present and voting. Amendments may be proposed by the Executive Council. They may also be proposed through a communication in writing signed by at least five members of the Society and deposited with the Secretary within ten months after the previous annual meeting. Amendments so deposited shall be reported upon by the Council at the next annual meeting.

All proposed amendments shall be submitted in writing to the members of the Society at least ten days before the meeting at which they are to be voted upon. No amendment shall be voted upon until the Council shall have made a report thereon to the Society.

REGULATIONS  
OF  
THE AMERICAN SOCIETY OF INTERNATIONAL LAW, A CORPORATION

*Adopted April 28, 1951; amended to June, 1970*

SECTION I. REGULATIONS ON MEMBERSHIP

1. Any person of good moral character, or organization acceptable to the Executive Council, interested in the objects of the Society may be admitted to membership in the Society.

2. There shall be the following classes of Annual Members: \*

(a) *Regular Members.* Persons eligible for membership not coming within any of the special categories set out below shall be Regular Members. Regular Members resident in the United States shall pay annual dues of \$25, and non-resident Regular Members, dues of \$10.

(b) *Intermediate Members.* Persons eligible for membership who are under 30 years of age at the time of application for membership may be admitted as Intermediate Members and shall pay annual dues of \$15 for the first 5 consecutive years of membership.

(c) *Professional Members.* Persons eligible for membership who are residents of the United States and are primarily engaged in the practice of law and have been members of the Bar for over ten years shall be Professional Members and shall pay annual dues of \$40. Other members, resident or non-resident, admitted to practice may, in their option, become Professional Members and shall pay annual dues of \$40.

(d) *Contributing Members.* Any individual member may become a Contributing Member for each year in which he contributes to the Society an amount which, with his annual dues, comes to at least \$50.

(e) *Supporting Members.* Any individual member may become a Supporting Member for each year in which he contributes to the Society an amount which, with his annual dues, comes to at least \$100.

(f) *Student Members.* Persons eligible for annual membership who submit with their applications satisfactory evidence that they are properly qualified graduate or undergraduate students in an institution of higher learning may become Student Members with annual dues of \$7.50. Student membership is valid for one year after the conferring of this membership. Such membership may be renewed from time to time at the discretion of the Executive Director on receiving satisfactory evidence that the person is still regularly enrolled as a student in an institution of higher learning.

3. Any corporation, partnership, association, or other organization acceptable to the Executive Council is eligible for corporate membership for each year in which it pays annual dues of \$1,000 or more.

\* Amendments of Sub-secs. 2-5 of Section I effecting changes in dues for the respective categories of members are effective January 1, 1971.



4. There shall be the following further classes of members who shall not be required to pay annual dues:

(a) *Life Members.* Individual members, or individuals eligible for membership, may become Life Members upon payment to the Society of \$1,000.

(b) *Members Emeriti.* Members of the Society shall be Members *Emeriti* upon completion of fifty years of membership in the Society.

(c) *Honorary Members.* Persons not citizens of the United States, who shall have rendered distinguished service to the cause which this Society is formed to promote, may upon nomination of the Executive Council be elected to honorary membership by the Society. Only one Honorary Member may be elected in any one year. Such members have the full privileges of life membership.

5. There shall be the following classes of Patrons:

(a) *Patrons of the Society.* Upon donation of at least \$5,000 in a single amount, or in contributions since January 1, 1961, in excess of dues aggregating at least \$5,000, or upon filing with the Executive Council satisfactory evidence establishing that the Society has been irrevocably made the beneficiary of such a sum, any individual member or individual eligible for membership may be elected by the Executive Council as a Patron of the Society and shall have the full privileges of life membership. As a token of its appreciation, the Society shall list the names of its Patrons in each issue of the *American Journal of International Law*. A Patron of the Society shall continue to be indicated as such after his death.

Upon the donation of at least \$5,000 in the name of a deceased person who was a member of the Society or was eligible for membership, the Executive Council may declare such person to be a Patron of the Society posthumously. As a token of its appreciation, the Society shall list the names of such Patrons in each issue of the *American Journal of International Law* under the heading, "In Memoriam."

(b) *Annual Patrons.* Any member of the Society or any individual eligible for membership may become an Annual Patron for each year in which he contributes to the Society an amount which, with his annual dues, comes to at least \$500. An organization eligible for membership may become an Annual Patron for each year in which it contributes at least \$500.

6. An appropriate application shall be submitted on behalf of each new member except an Honorary Member or a Patron.

7. The Executive Director shall add the name of the new member to the roster of members, subject to review by the Executive Council at its next meeting. If the Executive Director sees fit, he may refer the application to the Executive Council and not add the name of the applicant to the roster of members until after favorable action shall have been taken by the Executive Council.

8. A member may transfer his membership from one classification to another upon complying with applicable requirements.

9. Dues shall be payable in January of each year. Upon failure to pay dues before the end of June of the year in which they are payable, any member subject to the obligation to pay dues shall be suspended from membership. If, after such further dues notices during the course of the year as the Executive Director deems appropriate, the member has not paid his dues, the Executive Director shall remove the name of the delinquent from the membership roll. The action of the Executive Director shall be subject to review by the Executive Council at its next meeting.

10. Any individual or organization admitted to membership whose conduct does not conform to the requirements for membership may be suspended or dropped from membership by the Executive Council.

11. All members and patrons in good standing shall be entitled to receive the *American Journal of International Law*, including the *Proceedings* (corporate members being entitled to receive five copies of each).

12. Only natural persons may be voting members.

## SECTION II. REGULATIONS ON EXECUTIVE COUNCIL, EXECUTIVE COMMITTEE, AND BOARD OF REVIEW AND DEVELOPMENT

1. The Executive Council (herein termed the Council) during the intervals between its meetings shall function through an Executive Committee consisting of the President, Executive Vice President, Treasurer, and seven other members of the Council elected annually by the Council.

2. The Executive Committee may appropriate money only within the regulations pertaining to budget and finance.

3. There shall be established a Board of Review and Development which shall, if possible, meet several times a year to review current developments in law affecting public and private relations and transactions across national boundaries and current research and similar activities in these fields, seek to identify problems that in their judgment require further intensive study, organize such further study through committees (assisted where appropriate by rapporteurs and research assistants) or individual research, recommend the allocation of funds made available for these purposes from grants or other sources, and recommend the publication of papers resulting from its work. The Board shall consist of the incumbent President, his two immediate predecessors as President, the Executive Director, and the Editor-in-Chief of the *American Journal of International Law*, all serving *ex officio*, and fifteen other members whose terms shall be five years and who shall normally be ineligible to succeed themselves. At least three of the members shall be selected as persons known for their contributions to disciplines other than law. The Board shall co-opt new members to serve full terms or to fill vacancies in unexpired terms.

## SECTION III. REGULATIONS ON COMMITTEES

1. *General.* The standing committees of the Society, which may function through subcommittees, shall be those described below. With the

consent of the Executive Council the President may appoint and dissolve additional standing committees to deal with substantive problems. All committees shall make annual reports to the President for transmittal to the Executive Council and the Society, and such interim reports as the President or Executive Council may request. Standing committees except the Nominating Committee shall be appointed by the President and, unless otherwise specified, shall be advisory to the President, the Executive Council, and the Society. The President may appoint and dissolve *ad hoc* committees.

2. *Committee on the Budget.* The Committee on the Budget shall advise the Treasurer concerning the investment of the funds of the Society, provide for the annual audit of the financial transactions of the Society and of the books and records pertinent thereto, and advise concerning the ways and means of providing for the financial needs of the Society. The Committee on the Budget shall also advise concerning the equipping and maintaining of the Society's headquarters offices, the preparation of the annual budget, expenditures, and all other matters concerning the administration of the Society's business affairs.

3. *Committee on Corporate Membership.* The Committee on Corporate Membership shall advise concerning ways and means of supplementing the revenues from individual membership dues and from subscriptions. The committee may solicit contributions, including corporate memberships, in support of the general activities of the Society or intended to carry out specific activities in any form agreeable to the donor and consistent with the policies laid down by the Executive Council.

4. *Committee on Financing and Endowment.* The Committee on Financing and Endowment shall advise concerning ways and means of increasing the Society's revenues from foundations and other non-profit institutions, and shall assist the President and the Executive Director in securing grants from such institutions.

5. *Committee on the Annual Meeting.* The Committee on the Annual Meeting shall arrange the program of subjects and speakers for the annual meetings. The committee is authorized to limit the length of papers and speeches.

6. *Committee on Regional and Local Activities.* The Committee on Regional and Local Activities shall promote the organization of regional and local committees in appropriate localities in the United States and assist the regional and local committees to arrange meetings and other activities. The committee may advise the President on contributions to assist such meetings and other activities from funds designated for that purpose in the Society's budget.

7. *Committee on Membership.* The Committee on Membership under the direction of the Executive Council shall by correspondence or other means seek to enroll in the Society persons interested in the activities and purposes of the Society. For this purpose it shall approach members of the legal and teaching professions, diplomatic and government officials, and other groups, so as to obtain the widest membership. The committee's

activities shall also include the extension of the *American Journal of International Law* through subscriptions.

8. *Committee on Student and Professional Development.* The Committee on Student and Professional Development shall promote the interest of the Society in education and professional development in the field of international law and in the education of the public at large. The Committee shall examine educational programs in international law and related subjects and shall make suggestions for their improvement, propose educational and professional activities in which members of the Society might participate, and be available to provide counsel to student international law societies and other groups.

9. *Committee on the Library.* The Committee on the Library shall advise on general policy regarding the library of the Society.

10. *Committee on Tillar House.* The Committee on Tillar House shall advise on the maintenance and use of Tillar House and its furnishings. It may make recommendations to the Executive Council concerning memorials within the House.

11. *Committee on Selection of Honorary Members.* The Committee on Selection of Honorary Members shall recommend to the Executive Council for nomination as an honorary member of the Society a person not a citizen of the United States who has rendered distinguished service in the field of international law proper, namely, one who has made contributions to the science or the history of international law.

The committee shall file its report with the Executive Director of the Society at least three weeks prior to the annual meeting; the report shall state the qualifications upon which the recommendation of the committee is based, and shall within two weeks be sent to each member of the Executive Council for his consideration.

12. *Committee on Annual Awards.* The Committee on Annual Awards shall be responsible for recommending to the Executive Council of the Society not later than March 15 of each year the name of an author (or names if it be a collective authorship) of a work (in the form of a book, monograph, or article) in the field of International Law, which the committee feels deserves the award of the Certificate of Merit of The American Society of International Law. In making its recommendations it shall observe the following rules:

(a) The competition for the award is open to all regardless of nationality or the language or place of publication of the work.

(b) Works to be considered for the award must have been published within a twenty-four-month period preceding February 1 of the year in which the award is to be made.

(c) The author or his publisher shall forward to the Executive Director of the Society, for the committee's use, at 2223 Massachusetts Avenue, N.W., Washington, D. C. 20008, before February 1 of each year not less than three copies of any work which the author or publisher wishes considered for the award.

(d) The committee shall not limit its consideration to works filed with the Executive Director of the Society in accordance with the pro-

visions of paragraph (c) hereof, but may take notice of any other works which shall have been published during the twenty-four-month period preceding February 1 of the year in which the award is to be made.

(e) A majority vote of the committee is sufficient to support recommendation of a work to the Executive Council of the Society. The Executive Director of the Society shall forward the committee's recommendation to the members of the Executive Council. Should there be a dissenting opinion from the committee, the Executive Director of the Society, when forwarding the committee's recommendation, shall set forth the principal arguments of the majority and minority opinions of the committee. A majority vote of the Executive Council at a meeting of the Council shall be decisive as to its recommendation to the Society.

(f) In the event that no two members of the committee can agree on a work published during the period concerned as being sufficiently outstanding to merit the award of the Society, the committee may consider any work in the field of International Law published during a thirty-six-month period preceding February 1 of the year in which the award is to be made. In the event that no work published within such a period meets the standards of the committee, the Chairman shall so report to the Executive Council of the Society, and no award shall be made at the annual meeting of the Society for the year concerned.

(g) The award, if any there be, shall be conferred by the President of the Society in the name of the Society after the approval of the recommendation of the Executive Council by the Society at the annual meeting.

(h) The award shall consist of a framed certificate appropriately printed.

(i) The making of such award by the Society shall not constitute, nor be construed as constituting, adoption by the Society of the views of the author of any work receiving the award.

13. *Committee on the Manley O. Hudson Medal.* The Committee on the Manley O. Hudson Medal shall recommend to the Executive Council from time to time for nomination as a recipient of the gold medal established in the name of the Society by Ralph G. Albrecht a distinguished person of American or other nationality who has contributed to the scholarship and achievement of his time in international law.

A certificate reciting the achievements of the recipient shall be presented with each medal.

The committee shall report at each annual meeting of the Society and recall the terms of the gift, even though no recommendation of an award is made for that year.

14. *Committee on Department of State and United Nations Publications.* The Committee on Department of State and United Nations Publications shall promote the interests of the Society in making available for educational, professional, and historical purposes, in permanent and accessible form, official texts of treaties and treaty information, diplomatic correspondence, and other documentary material relating to international law

and international relations. The committee is authorized to represent the Society, orally or in writing, before appropriate government officials or bodies, on matters within the jurisdiction of the committee and to co-operate with committees of other societies interested in the same purposes.

15. *Nominating Committee.*

(a) The Executive Council, advised by the Executive Committee, shall make nominations for the Nominating Committee at its meeting next prior to the business session of the annual meeting. Nominations shall preferably be made from retiring members of the Executive Council and shall include one member of the existing Nominating Committee to serve one additional year. Members of the Nominating Committee shall serve through the business session of the next annual meeting.

(b) The Nominating Committee shall draw up a slate of candidates for all elective offices, which shall be notified to members of the Society at least one month in advance of the annual meeting through suitable publications. Members who plan to make nominations from the floor should be encouraged to post the names of persons they propose to nominate from the floor prior to the business session of the annual meeting.

(c) The Nominating Committee shall notify candidates for membership on the Executive Council that the three-year term of the office for which they are nominated begins immediately after the business session of the annual meeting at which the election takes place.

#### SECTION IV. REGULATIONS ON MEETINGS OF THE SOCIETY

##### 1. *Annual Meetings*

(a) The Executive Council shall determine the time and place for the annual meetings of the Society, which shall be held, if possible, in the same place where arrangements are made for holding the annual banquet.

(b) No paper prepared for delivery at an annual meeting of the Society shall be read at such meeting by any person except the writer thereof, unless there be a special resolution of the Executive Council authorizing its reading in the writer's absence. With the exception of those papers for which special authority is given for their reading by some other person, all papers which the authors are unable to read shall be read simply by title.

(c) The printed programs of the Society's meetings shall bear the Seal of the Society and carry the standing committees of the Society.

(d) Any notice published in the *Journal* shall constitute due notice to all members of the Society.

2. *Regional Meetings.* There may be held from time to time, without modifying the program of annual meetings of the Society, regional meetings to discuss problems of international law and relations. Such regional meetings shall be organized by groups of members of the Society, under a regional director appointed for the purpose, in the locality where held, and shall be open to the public if the members so decide. No Society business shall be transacted at such meetings, and no regional meeting shall take any action binding upon the Society.

## SECTION V. REGULATIONS ON PUBLICATIONS

1. *American Journal of International Law*

(a) The Society shall publish as its official organ a periodical entitled *The American Journal of International Law*.

(b) The publication of the *Journal* shall be under the direct supervision of the Editor-in-Chief, who shall have authority in his discretion to make appropriate arrangements with publishers regarding the printing of the *Journal*.

(c) The editing and publication of the *Journal* shall be subject to the following rules and regulations:

(1) There shall be a Board of Editors charged with the general supervision of editing the *Journal* and determining general matters of policy in relation thereto.

(2) The Board shall consist of not more than twenty-two members to be elected annually by the Executive Council from among the members of the Society who have capacity for scholarly production and whose availability and probability of activity qualify them for useful membership on the Board.

(3) Membership upon the Board of Editors shall involve, in addition to the duties otherwise prescribed herein, obtaining articles and other material for publication, the preparation of contributions, especially editorial comments and book reviews, and the examination of and giving advice upon the suitability for publication of articles prepared by non-members of the Board.

(4) There shall be an Editor-in-Chief to be elected annually from among the members of the Board by the Executive Council. The Editor-in-Chief shall call and preside at all meetings of the Board of Editors, and when the Board is not in session he shall determine matters of policy regarding the contents of the *Journal*. The Executive Council may establish an honorarium to be paid to the Editor-in-Chief and may reimburse him for the expenses incurred in the performance of his duties. In the event of the temporary inability of the Editor-in-Chief to serve, his duties shall be performed by one or more of the editors to be designated by him or by the other members of the Board, who may be likewise compensated and reimbursed.

(5) The staff of the Society shall include an Assistant Editor, who shall be appointed and whose duties shall be determined in co-operation with the Board of Editors; editorial duties in connection with the *Journal* shall be formulated exclusively by the Board of Editors.

(6) The Executive Council may elect annually as honorary members of the Board of Editors members of the Board of long service who have reached the age of sixty-five. Such honorary members shall be in addition to the membership of the Board provided for in paragraph (c) (2) hereof. They shall continue to exercise such editorial functions as they may wish to perform, subject to all other regulations herein prescribed.

(7) The *Journal* shall include leading articles, editorial comments, notes, judicial decisions involving questions of international law, book reviews and notes, a list of books received, and a section of official documents.

(i) Before publication all articles shall receive the approval of two members of the Board: In case an article is rejected by one editor, the question of its submission to another editor shall be decided by the Editor-in-Chief. Articles by members of the Board of Editors shall be submitted to the Editor-in-Chief, who shall decide as to their publication.

(ii) Editorial comments must be written and signed by the members of the Board of Editors, and shall be published without submission to any other editor, except that they shall be governed by the provisions of paragraph (c) (8) hereof.

(iii) The department of judicial decisions shall be made up of summaries of judicial decisions rendered by courts in the United States and elsewhere, including international tribunals, extracts from decisions deserving quotation at some length, and the full texts of any decisions meriting such treatment.

(8) The *Journal* shall be published on the 15th day of January, April, July, and October, or as near those dates as possible. The final make-up of each number shall be submitted to the Editor-in-Chief, who shall have the power to veto the publication of any contribution or other material. The Assistant Editor shall proceed, subject to these regulations, with the publication of the *Journal* at such times as may be necessary to insure its appearance on the publication date.

## 2. *Annual Proceedings*

(a) The Society shall also publish yearly the proceedings of its annual meetings. The *Proceedings* shall be published on the 15th day of August or as soon thereafter as possible, and for this purpose there shall be set a time limit within which papers for publication in the *Proceedings* shall be received.

(b) The *Proceedings* shall contain an account of the principal papers read, addresses delivered, and discussion had at the annual meetings, the minutes of the business meeting of the Society, other important reports, and an adequate index. The Executive Director shall be responsible for the editing and publication of the *Proceedings*.

## 3. *International Legal Materials*

(a) The Society shall publish, once every two months, a collection of current documents involving the international aspects of law, entitled "International Legal Materials," including recent legislation and regulations, treaties and agreements, briefs and decisions in judicial proceedings official reports, and other official documents from the United States, other countries, and international organizations.



(b) The publication of *International Legal Materials* shall be under the direct supervision of an Editor, appointed by the Executive Council, who shall have authority to designate members of an Editorial Advisory Committee to consult on editorial policy, to designate assistant editors, and, within the limits of funds budgeted for the publication by the Council, to make appropriate arrangements for publication and distribution and to pay reasonable honoraria to suppliers of documents for publication.

#### 4. *Subscription Rates*

The Executive Council shall determine the rates of subscriptions and the terms and conditions under which the *Journal* and other publications shall be distributed to subscribers and others.

### SECTION VI. REGULATIONS ON THE OFFICE OF EXECUTIVE DIRECTOR

1. There shall be an Executive Director appointed by the Executive Council to serve at its pleasure.

2. The Executive Director shall devote the major part of his time to the work of the Society, shall assist the President in the performance of his duties, shall assist the committees of the Society in carrying out their functions, and shall perform such other duties as may be assigned to him by the Executive Council. Among other duties, the Executive Director, in consultation with appropriate committees, shall make recommendations to the President and Executive Council concerning the composition of the staff, program, and budget of the Society and shall make an annual report.

3. The Executive Director shall appoint the staff of the Society, whose duties and terms of service he shall determine within a staffing pattern and budget authorized by the Executive Council. Within the approved budget, he may appoint temporary consultants or employees to assist in the execution of his duties.

4. The Executive Director shall receive notice of all meetings of the Executive Council, the Executive Committee, and all committees of the Society.

5. It shall be the duty of the Executive Director to attend meetings of the Executive Council and Executive Committee of the Society (except when the conduct of his office and terms of his appointment are considered).

6. The Executive Director may attend the meetings of all committees of the Society.

7. The position of Executive Director may be held by an elected officer of the Society, who may be designated Executive Vice President.

### SECTION VII. REGULATIONS ON THE OFFICES OF THE SOCIETY

1. The Society shall maintain an office in the District of Columbia as its principal office and may maintain offices in such other places as may be determined by the Executive Council from time to time.

2. The office of the Society in the District of Columbia shall be under the immediate direction and supervision of the Executive Director.

## SECTION VIII. REGULATIONS ON BUDGET AND FINANCE

1. The expenditures of the Society shall be controlled by the annual budget adopted by the Executive Council. The Executive Director, under the direction of the President and in consultation with the Editor-in-Chief of the *Journal*, the Treasurer, and the Committee on the Budget, and such other committees as may be appropriate, shall prepare the proposed annual budget for submission to the Executive Council.

2. The proposed annual budget shall include estimates of the main items of expenses by major categories, including the staff, the *Journal*, other publications, library, maintenance of the headquarters, supplies and equipment, travel, meetings, and consultants. The annual budget as approved by the Executive Council shall regulate all expenditures for the fiscal year concerned. The Executive Committee is empowered to authorize adjustments in the annual budget within the total authorized by the Executive Council.

3. On behalf of the Society the Executive Council may receive gifts or grants limited by the donor for specific purposes outside the regular budget and authorize expenditure of such gifts or grants, delegating such responsibility as it shall consider appropriate to the officers and Executive Director. Such authorizations of receipts and expenditures shall be considered as amendments to the approved annual budget. This provision shall not apply to gifts or grants for the general purposes of the Society.

4. The Executive Director, or in his absence or disability such other person as the President or Executive Council may designate, shall be authorized to incur obligations on behalf of the Society within the amounts authorized for expenditure in the approved annual budget.

5. *Reserve Funds.* Funds not currently needed for expenditures under the approved annual budget and any other funds, except the investment fund provided by Regulation 6 of this Section, shall be kept by the Treasurer, at his discretion, in Federally insured savings accounts, or shall be invested by him in stocks or securities. The Treasurer may transfer from such savings accounts or investments to the checking account or accounts funds required to meet expenditures authorized by the approved annual budget.

6. *Investment Fund.* The Treasurer shall invest all payments received pursuant to Regulation 4 (a) of Section I and keep the same as a permanent fund, the income from which shall be devoted to the interests of the Society. To the extent practicable, he shall keep such funds invested in stocks and securities. He is authorized, in his discretion, to sell any stocks and securities which are now or may become part of the investment fund and to reinvest the proceeds. He may keep a reasonable amount in Federally insured savings accounts.

7. *Checking Accounts.* The Treasurer shall maintain one or more checking accounts in a bank or banks approved by the Executive Council, in which funds of the Society which are not deposited or invested under Regulations 5 and 6 of this Section regarding reserve and investment funds shall be deposited and kept, subject to checks drawn in the name of the

Society by its Treasurer, Assistant Treasurer, Executive Director, Director of Studies, or the Chairman of the Committee on the Budget. Any check so drawn by the Executive Director or the Director of Studies shall bear the countersignature of the Treasurer, the Assistant Treasurer or the Chairman of the Committee on the Budget if the amount thereof is greater than \$500.00. The Executive Director shall promptly at the end of each month communicate to the Treasurer a memorandum of all deposits in and withdrawals from the account during the month.

8. *Safe Deposit Box.* The Treasurer is authorized and directed to contract in the name of the Society for continued use of a suitable safe deposit box in a bank in Washington, D. C.

It shall be provided in and by such contract that access to the contents of such box may be had only by not less than any two of the incumbents for the time being of the office of President, of Treasurer, of Assistant Treasurer, and of Secretary, or by the Treasurer or Assistant Treasurer and any one of the members of the Committee on the Budget. The Secretary shall immediately after adjournment of the annual meeting certify to the bank in which the safe deposit box is located, under seal of the Society and countersignature of the President, the names of the incumbents of each of the above-mentioned offices and of the members of the Committee on the Budget.

Such certificate shall be accompanied by all requisite signature or other cards of identification.

9. The Treasurer, Assistant Treasurer, or Chairman of the Committee on the Budget is each authorized to pay bills approved by the Executive Director, or in case of the absence or disability of the Executive Director, such other person as the President or Executive Council may designate, within the amounts authorized for expenditure in the approved annual budget. The Executive Director or, in his absence or disability, the Director of Studies, is authorized to pay bills not exceeding \$500.00 in amount and within the limits authorized for expenditure in the approved annual budget.

10. The Treasurer shall submit such financial reports as the Executive Council shall request. He shall also submit an annual financial report to the Society at the annual meeting, which report shall cover the fiscal year beginning on the first day of April in each year.

11. The Treasurer shall submit such periodic financial reports as may be required by persons or institutions making grants or gifts to the Society, or by agencies of the Federal, State, or municipal governments.

12. The Assistant Treasurer shall perform all the functions described above in case of the absence or disability of the Treasurer, and may at any time and from time to time perform any of said functions upon being thereunto authorized and directed by the Treasurer.

#### SECTION IX. REGULATIONS ON NUMBER OF HONORARY VICE PRESIDENTS

The number of Honorary Vice Presidents shall be sixteen.

## INDEX

[Abbreviations: *Ad*, address; *AJIL*, American Journal of International Law; *ASIL*, American Society of International Law; *Rem*, remarks.]

- Adams, William T. Association of Student International Law Societies. President's Report. 315.
- Aggression. Arab-Israeli hostilities. J. J. Barceló III, *Rem*, 80; A. El Erian, *Rem*, 83; E. V. Rostow, *Ad*, 65, *Rem*, 80; Q. Wright, *Ad*, 71, 72, *Rem*, 80.
- Ago, Roberto. Elected honorary member of ASIL. 262.
- American Bar Association Committee on Foreign Investments. Report on Technical and Policy Problems under the Foreign Direct Investment Regulations. Cited, 98; quoted, 97.
- American Journal of International Law. Board of Editors, 321, regulations, 341; Report of ad hoc Committee on Governance, 267; Report of Executive Director, 260; section of Periodical Literature, A. V. Freeman, *Rem*, 269; J. N. Hazard, *Rem*, 269; E. Schwelb, *Rem*, 269.
- American Law Institute, Restatement of Foreign Relations Law of the United States. Sec. 18 on extraterritorial application of national laws, P. A. Bator, *Rem*, 145, I. N. P. Stokes, *Ad*, 137; Sec. 40 on limitations on enforcement jurisdiction, cited, 144, quoted, 139.
- American Society of International Law. Annual dinner: addresses, 277, 285; remarks of toastmaster, 271, 273, 276, 284, 291; annual meetings outside Washington, J. N. Hazard, *Rem*, 268; practitioner panels, D. M. Gooder, *Rem*, 268; Board of Review and Development, 323, regulations, 336; Director of Studies, appointment of, 260; report of Executive Director, 260; Committees, 321, regulations, 336, reports, 262, 263, 265, 266, 293; Executive Committee, 320, regulations, 336, report of ad hoc Committee on Governance, 267; Executive Council, 320, 327, 332, regulations, 336; Executive Director and Vice President, 320, regulations, 343, report, 260; Ford Foundation grant to, O. Schachter, *Rem*, 261, S. M. Schwelb, *Rem*, 262; governance of, Report of ad hoc Committee, 266, H. D. Lasswell, *Rem*, 267; Library, M. H. Cardozo, *Rem*, 269; membership, 330, regulations, 334, report of Executive Director, 260, survey of, S. M. Schwelb, *Rem*, 267; committee, 322, regulations, 337; honorary members, 330, regulations, 335, committee, 322, regulations, 338, report, 262; in memoriam, 292; members emeriti, 292, 330, regulations, 335; officers, 320, 327, 331, election, 265, procedures, Report of ad hoc Committee on Governance, 266; publications, regulations, 341, Report of Executive Director, 260; resolutions: Documentation of the U.N. Committee on the Elimination of Racial Discrimination, 265; Publication of Foreign Relations of the United States, 264; student members, amendment of ASIL regulations on right to vote and hold office, Report of ad hoc Committee on Governance, 266.
- Annual awards. Committee on, 321; regulations, 338; report, 262.
- Arab states-Israel conflict. United Nations and legal aspects of search for peace. E. V. Rostow, *Ad*, 64, *Rem*, 78, 79, 80, 82, 83, 85, 86; Q. Wright, *Ad*, 71, *Rem*, 78, 79, 80, 81, 82, 84, 85, 86; *Rem*: J. J. Barceló III, 79, 80, 81; B. M. Becker, 86; S. Bhatt, 86; M. Domke, 81; A. El Erian, 83; V. L. Ferwerda, 82; R. D. Fisher, 79; R. C. Lawson, 82; D. Y. T. Lew, 84; J. N. Moore, 84; M. Mughraby, 85; A. J. Multer, 83; I. Nakhleh, 85; G. Obiozor, 84; M. P. Persico, 86; F. Sakran, 82; S. P. Sinha, 85; R. W. Tucker, 78, 79.
- Arbitration, international. Arab-Israeli dispute, M. Domke, *Rem*, 81, Q. Wright, *Ad*, 73, *Rem*, 81; rôle of the party-appointed arbitrator, H. W. Baade, *Rem*, 256, H. P. deVries, *Ad*, 251, *Rem*, 254, 255, E. A. Gross, *Rem*, 253.
- Arbitration clauses in international contracts. H. W. Baade, *Rem*, 255; H. H. Bachrach, *Rem*, 254; J. Carey, *Rem*, 254; E. A. Gross, *Rem*, 254.
- Arctic waters. Pollution of. Canadian action with respect to. D. W. Bowett, *Rem*, 53; M. Cohen, *Rem*, 62; W. Friedmann, *Rem*, 60, 230; R. Higgins, *Rem*, 58; D. M. Johnston, *Rem*, 57; M. S. McDougal, *Rem*, 56; E. McWhinney, *Rem*, 234; G. L. Morris, *Rem*, 52; G. Spillcott, *Rem*, 232.
- Arms, limitation of. See Disarmament.
- Association of Student International Law Societies. Meeting of, and ASIL annual meeting, P. D. Trooboff, *Rem*, 268; President's Report, 315.

- Atkeson, Timothy B. The United Nations and the environment. A comment. *Ad.* 226.
- Baade, Hans W. Nationality of arbitrators, *Rem*, 256; U. S. courts and arbitration clauses in international contracts, *Rem*, 255.
- Bachrach, Howard H. Procedure in litigation before the International Court of Justice. *Ad*, 245; *Rem*, 255.
- Bacteriological warfare. Banning of. G. Bunn. *Ad.* 194.
- Barceló, John J., III. The United Nations and the search for peace in the Middle East. *Rem.* 79, 80, 81.
- Barcelona Traction case, Belgium-Spain, I.C.J., 1970. Cited, 246, 248, 255, 257; opinion of Judge Jessup, cited, 250, 255.
- Bard, Robert L. United Nations and peacekeeping. *Rem.* 21.
- Bator, Peter A. Extraterritorial application of law: United States securities laws. *Ad*, 141; *Rem*, 145, 146.
- Batson Yarn v. Saurer-Allma, 311 F. Supp. 68. Cited. 256.
- Baxter, Richard R. Report of ad hoc Committee on Governance of the Society. 266, 267.
- Becker, Benjamin M. Peace in the Middle East and Israeli security, *Rem*, 86; U. S.-U.S.S.R. strategic arms limitation negotiations, *Rem*, 207.
- Belligerent occupation. Israeli occupation of Arab territory. J. J. Barceló III, *Rem*, 79, 80; A. El Erian, *Rem*, 83; J. N. Moore, *Rem*, 84; E. V. Rostow, *Ad*, 66, *Rem*, 78, 79, 83; R. W. Tucker, *Rem*, 78, 79; Q. Wright, *Ad*, 71, 73, *Rem*, 78, 79, 80.
- Bhatt, S. Portuguese title to Goa, *Rem*, 86; title by conquest, *Rem*, 86; the United Nations and application of science and technology in developing countries, *Rem*, 188; U.N. resolutions as evidence of international law, *Rem*, 56.
- Bleicher, Samuel A. Economic development and environment, *Rem*, 235; the U.N. General Assembly and interpretation of the Geneva Protocol on Chemical and Biological Warfare, *Rem*, 54.
- Boundaries. Israel-Arab states. E. V. Rostow, *Ad*, 67, *Rem*, 78; Q. Wright, *Ad*, 73, *Rem*, 81.
- Boundary waters, U. S.-Canada. International Joint Commission and environmental problems. J. Chacko, *Rem*, 233; R. E. Stein, *Rem*, 225.
- Bowett, D. W. The impact of the U.N. structure, including that of the specialized agencies, on the law of international organization, *Ad*, 48, *Rem*, 53, 54, 56, 58, 60; lawmaking and dissenting minorities, *Rem*, 58; U.N. resolutions as evidence of international law, *Rem*, 56.
- Brand, George. Impact of science and technology on human rights. *Rem.* 188.
- Broches, A. Arbitrators under Convention on Settlement of Investment Disputes. *Rem.* 254.
- Bunn, George. Banning of poison gas and germ warfare. The United Nations rôle, *Ad*, 194; banning of MIRVs, *Rem*, 205; banning of tear gas, *Rem*, 209; U. S. and chemical and biological warfare, *Rem*, 203, 204.
- Caldwell, Mary Ellen. The United Nations and science: past and future implications for world health. *Ad*, 172; *Rem*, 171, 186, 188.
- Canada. Extraterritorial application of U. S. law to, P. A. Bator, *Ad*, 142, 143, M. Cohen, *Rem*, 145, I. N. P. Stokes, *Ad*, 140, W. S. Surrey, *Rem*, 146; unilateral action with regard to Arctic maritime pollution, D. W. Bowett, *Rem*, 53, M. Cohen, *Rem*, 62, W. Friedmann, *Rem*, 60, 230, R. Higgins, *Rem*, 58, D. M. Johnston, *Rem*, 57, M. S. McDougal, *Rem*, 56, E. McWhinney, *Rem*, 234, G. L. Morris, *Rem*, 52, G. Spillcott, *Rem*, 232.
- Canada-United States. International Joint Commission and environmental problems. J. Chacko, *Rem*, 233; R. E. Stein, *Rem*, 225, 233.
- Cardozo, Michael H. ASIL Library, *Rem*, 269; ASIL proposed resolution on publication of U. S. Foreign Relations, *Rem*, 264.
- Carey, John. Arbitration clauses in international contracts, *Rem*, 264; Report of Committee on Publications of the Department of State and the United Nations, 263, 293, *Rem*, 264; what litigators should know about the United Nations, *Ad*, 238.
- Chacko, Joseph. Binding decisions of U.N. political organs, *Rem*, 62; developing nations and environmental problems, *Rem*, 233; regional organizations and environmental problems, *Rem*, 233.
- Chemical and biological warfare. U.N. rôle in banning. G. Bunn. *Ad.* 194.  
See also Poison gas and Tear gas.

- China. Nuclear disarmament. M. H. Halperin, *Rem*, 208; K. L. Koh, *Rem*, 208.
- China-Union of Soviet Socialist Republics. Effect of relations on U. S.-Soviet strategic arms limitation negotiations. B. M. Becker, *Rem*, 208; M. H. Halperin, *Rem*, 207; S. C. Yuter, *Rem*, 207.
- Christol, Carl Q. The United Nations and the environment, *Rem*, 232; the United Nations and peacekeeping, *Rem*, 19.
- Cohen, Maxwell. Access to U.N. documents, *Rem*, 264; Canadian action regarding pollution of Arctic waters, *Rem*, 62; extraterritorial application of U. S. law to Canada, *Rem*, 145.
- Cohen, Stephen B. Banking corporations and foreign investment, *Rem*, 104; the International Law Commission and lawmaking, *Rem*, 53; reform of procedure before I.C.J., *Rem*, 258; relation of regional organizations to U.N. in lawmaking, *Rem*, 53.
- Coleman, William T. U.N. law on human rights and the United States. *Rem*. 121.
- Commerce, foreign. Limits imposed by international law on regulation of. I. N. P. Stokes. *Ad*, 135; *Rem*, 145, 146, 147.
- Conflict of laws. Extraterritorial application of law, H. Harfield, *Ad*, 130, *Rem*, 145; extraterritorial application of U. S. securities laws, F. A. Bator, *Ad*, 141, *Rem*, 145, 146; limits imposed by international law on regulation of extraterritorial commercial activity, I. N. P. Stokes, *Ad*, 135, *Rem*, 145, 146, 147; public international law and, V. C. Govindaraj, *Rem*, 145, H. E. Hensleigh, *Rem*, 146, I. N. P. Stokes, *Rem*, 146.
- Corfu, Channel case, I.C.J. Cited. 257.
- Corporations, banking. Rôle in transnational financing. C. R. Wetzel. *Ad*, 91; *Rem*, 101, 102, 104.
- Crawford, David M. Transnational investment and national economy. *Rem*. 103.
- Customary international law. W. Friedmann, *Rem*, 61; R. Higgins, *Ad*, 38, *Rem*, 61, 62; S. Rosenne, *Rem*, 61; L. B. Sohn, *Rem*, 61; J. Wolff, *Rem*, 61; treaty law and, J. Pickers, *Rem*, 63, S. Rosenne, *Rem*, 63.
- Cyprus. United Nations peacekeeping in. D. H. Popper, *Ad*, 1, *Rem*, 17, 20, 21, 22; *Rem*: R. L. Bard, 21; L. L. Fabian, 22; E. Jackson, 20, 21; I. J. Rikhye, 17; B. Yanakakis, 21.
- Debevoise, Eli Whitney. International protection of human rights. *Rem*. 128.
- Developing countries. Application of science and technology in, M. E. Caldwell, *Ad*, 173, 176, *Rem*, 186, 188; S. Bhatt, *Rem*, 188; C. F. Murphy, *Rem*, 186; C. L. Wilson, *Rem*, 183; environment problem and, S. A. Bleicher, *Rem*, 235; J. Chacko, *Rem*, 233; R. A. Falk, *Ad*, 218; R. N. Gardner, *Rem*, 230; G. Gottlieb, *Rem*, 236; C. Herter, Jr., *Rem*, 234; N. A. Robinson, *Rem*, 236.
- deVries, Henry P. Practical aspects of international litigation: arbitration. *Ad*, 251; *Rem*, 254, 255.
- Dillard, Judge Hardy C. Nationality of judges and I.C.J. judgments, *Rem*, 256; reform of procedure of I.C.J., *Rem*, 256, 259.
- Disarmament. The United Nations and. C. Bunn, *Ad*, 194, *Rem*, 203, 204, 205, 209; M. H. Halperin, *Ad*, 200, *Rem*, 205, 206, 207, 208, 209, 210; C. N. Van Doren, *Ad*, 191, *Rem*, 204, 206, 209, 210; *Rem*: B. M. Becker, 207; A. S. Fisher, 190, 199, 204, 206, 207, 208, 210; K. L. Koh, 208; L. Lipson, 203, 204, 205, 206; B. P. Sinha, 206; F. Smedley, 208, 210; J. R. Williams, 209; Q. Wright, 207, 209, 210; S. C. Yuter, 207, 210.
- Domke, Martin. Compulsory arbitration of the Middle East conflict. *Rem*. 81.
- Donovan, Richard. The U.N. Security Council and peacekeeping. *Rem*. 18.
- Edge Act corporations. Rôle in transnational financing. C. R. Wetzel, *Ad*, 91, *Rem*, 101, 102, 104; *Rem*: H. Fitzgibbon, 100; C. T. Oliver, 101; F. M. Oppenheimer, 103.
- Edwards, Richard W., Jr. Report on survey of ASIL membership, S. M. Schwebel, *Rem*, 267; resignation as Assistant Director of ASIL, 261.
- El Erian, Abdullah. Legal aspects of the search for peace in the Middle East. *Rem*. 83.
- Environment. Global approach to problems of, R. A. Falk, *Ad*, 217, *Rem*, 237; international agency on, M. E. Caldwell, *Ad*, 179, 181, K. G. J. Pillai, *Rem*, 185; regional organizations and, R. E. Stein, *Rem*, 224.
- The United Nations and. T. B. Atkeson, *Ad*, 226; R. A. Falk, *Ad*, 217, *Rem*, 230, 237; R. N. Gardner, *Ad*, 211, *Rem*, 230, 232, 237; C. Herter, Jr., *Rem*, 214, 231,

- 234, 235, 237; D. McRae, *Ad*, 227; *Rem*: S. Bleicher, 235; J. Chacko, 233; C. Q. Christol, 232; R. D. Fisher, 236; J. Fried, 234; W. Friedmann, 230; G. Gottlieb, 236; E. Hambro, 231; D. M. Johnston, 234; M. S. McDougal, 233; E. McWhinney, 234; V. P. Nanda, 235; N. A. Robinson, 236; R. Russell, 235; F. Sarguis, 236; G. Spillcott, 232; R. E. Stein, 233.
- Evan, Charles. International litigation. *Rem*. 257.
- Extraterritorial application of law. P. A. Bator, *Ad*, 141, *Rem*, 145, 146; H. Harfield, *Ad*, 130, *Rem*, 145; I. N. P. Stokes, *Ad*, 135, *Rem*, 145, 146, 147; *Rem*: M. Cohen, 145; S. Farrar, 146; V. C. Govindaraj, 145; H. E. Hensleigh, 146; P. J. Kozyris, 147; M. Leigh, 147; F. M. Oppenheimer, 146; W. S. Surrey, 146; P. D. Trooboff, 147; B. Yanakakis, 146.
- Fabian, Larry L. Some perspectives on peacekeeping institutions. *Ad*, 9; *Rem*, 18, 19, 21, 22, 24.
- Falk, Richard A. Toward equilibrium in the world order system. *Ad*, 217; *Rem*, 230, 237.
- Farer, Tom J. Effect of expropriations on foreign investment. *Rem*. 103.
- Farrar, Stanley. Fruehauf case, Paris Ct. App., 1965. *Rem*. 146.
- Ferencz, Benjamin B. International protection of human rights. *Rem*. 125.
- Ferwerda, Vernon L. Nationality of Palestinian Arabs, *Rem*, 82; U.N. Commission of Governmental Representatives in science and technology, *Rem*, 188.
- Finance, international. The U.N. system and transnational investment. F. M. Oppenheimer, *Ad*, 94, *Rem*, 101, 102, 103, 104; R. B. J. Richards, *Ad*, 87, *Rem*, 101, 102, 103, 104, 105; C. R. Wetzel, *Ad*, 91, *Rem*, 100, 101, 102, 104; *Rem*: S. B. Cohen, 104; D. M. Crawford, 103; T. J. Farer, 103; H. Fitzgibbon, 100, 102, 103, 104; C. Hunt, 105; C. T. Oliver, 87, 101; P. N. Schwartz, 102; W. S. Surrey, 102; P. Trooboff, 101, 103, 104.
- Fisher, Adrian S. McCloy-Zorin agreement on disarmament, *Rem*, 207; Nuclear Non-Proliferation Treaty negotiations, *Rem*, 204; Nuclear Test Ban Treaty, *Rem*, 206; Soviet position on nuclear weapons, *Rem*, 210; the United Nations and disarmament, *Rem*, 190; U. S.-U.S.S.R. negotiations on strategic arms limitation, *Rem*, 199, 208.
- Fisher, Roger D. Environment control, *Rem*, 236; the United Nations and the search for peace in the Middle East, *Rem*, 79.
- Fitzgibbon, Harry. Financing transnational investment. *Rem*. 100, 102, 103, 104.
- Ford Foundation. Grant to ASIL. O. Schachter, *Rem*, 261; S. M. Schwebel, *Rem*, 262.
- Foreign direct investment controls. *See* United States.
- Fraleigh, Arnold. U.N. peacekeeping and peacemaking. *Rem*. 22.
- Freeman, Alwyn V. Periodical literature section of AJIL. *Rem*. 269.
- Fried, John H. E. United Nations and environmental problems. *Rem*. 234.
- Friedmann, Wolfgang. Canadian action in regard to pollution of Arctic waters, *Rem*, 230; unilateral control of environment, *Rem*, 230; United Nations and lawmaking, *Rem*, 24, 59, 61; Westphalian state system of order, *Rem*, 231.
- Fruehauf Corp. v. S. A. des Automobiles Berliet, Ct. App. Paris, 1965. I. N. P. Stokes, *Ad*, 140, *Rem*, 146; S. Farrar, *Rem*, 146.
- Gardner, Richard N. The United Nations and the environment. *Ad*, 211; *Rem*, 230, 232, 237.
- Geneva Protocol of 1925 on poisonous gases and bacteriological methods of warfare. G. Bunn, *Ad*, 194; U.N. General Assembly interpretation of, S. A. Bleicher, *Rem*, 54; R. Higgins, *Rem*, 54.
- Goldenberg, Caryn. The individual as a subject of international law. *Rem*. 60.
- Goldmann, Nahum. The Future of Israel. Cited, 84; quoted, 77.
- Goldsen, Joseph M. The United Nations and the social sciences. *Rem*. 186.
- Gottlieb, Gidon. Developing nations and environment. *Rem*. 236.
- Governmental Committee on Science and Technology. V. L. Ferwerda, *Rem*, 188; C. L. Wilson, *Rem*, 188.
- Govindaraj, V. C. Basis of private and public international law. *Rem*. 145.
- Great Powers. U.N. peacekeeping and. C. Q. Christol, *Rem*, 19; L. L. Fabian, *Ad*, 14, *Rem*, 19; E. Jackson, *Rem*, 18, 19, 23; L. Miller, *Rem*, 19; D. H. Popper, *Ad*, 9, *Rem*, 18, 19, 21; I. J. Rikhye, *Rem*, 17, 20, 23; B. Yanakakis, *Rem*, 21.
- Gross, Ernest A. Practical aspects of international litigation. *Rem*. 238, 253, 254, 258, 259.

- Gross, Franz B. U.N. peacekeeping by small Powers. *Rem.* 23.
- Guggenheim, Paul. Award of Manley O. Hudson Medal to, 271; remarks of E. Hambro, 272, B. Turrettini, 273; statement by Professor Guggenheim, 274.
- Halperin, Morton H. Prospects for SALT. *Ad.* 200; *Rem.* 205, 206, 207, 210.
- Hambro, Ambassador Edvard. Presentation of Hudson Medal to Paul Guggenheim, *Rem.* 272; the United Nations and the environment, *Rem.* 231.
- Hanessian, John, Jr. U.N. Secretariat and science and technology. *Rem.* 189.
- Hansen, Peter. Regional organizations and U.N. peacekeeping. *Rem.* 23.
- Harfield, Henry. Extraterritorial application of law. General principles. *Ad.* 130; *Rem.* 145.
- Hargrove, John Lawrence. Appointed Director of Studies of the ASIL. 260.
- Hauser, Rita. United Nations law on racial discrimination. *Ad.* 114; *Rem.* 123, 125, 126, 128, 129.
- Hazard, John N. Annual meetings of Society and practitioner panels, *Rem.* 268; periodical literature section of AJIL, *Rem.* 269; remarks as toastmaster, 271, 273, 276, 284, 291.
- Health, world. The United Nations and science. Past and future implications for. M. E. Caldwell. *Ad.* 172; *Rem.* 171, 186, 188.
- Hensleigh, Howard E. I.C.J. decisions, *Rem.* 257; public international law and conflict of laws, *Rem.* 146.
- Hørter, Christian, Jr. The United Nations and the environment. *Rem.* 214, 231, 234.
- Higgins, Rosalyn. Proposed reform of I.C.J. procedure, *Rem.* 256; the United Nations and lawmaking: the political organs, *Ad.* 37, *Rem.* 54, 55, 58, 60, 61, 62.
- Holloway, Kaye. National attitudes on racial discrimination, *Rem.* 127; reservations to Convention on Elimination of Racial Discrimination, *Rem.* 128; U.N. General Assembly resolution on Reservations to Multilateral Conventions, *Rem.* 62.
- Honorary members of ASIL. 330; regulations, 335; committee on selection, 322, regulations, 338, report, 262.
- Hudson, Manley O., Medal. Committee, 322, regulations, 339; award to Professor Paul Guggenheim, 271, remarks of E. Hambro, 272, of B. Turrettini, 273; statement of Professor Guggenheim, 274.
- Human rights. Education and development of, R. Hauser, *Rem.* 125; fact-finding commissions, R. Hauser, *Rem.* 128; petitions to U.N. Commission, *see* United Nations Commission on Human Rights; regional development, R. Hauser, *Rem.* 124; Scientific and Technological Developments and, U.N. Study, G. Brand, *Rem.* 188; U.N. High Commissioner on, proposed, E. W. Debevoise, *Rem.* 128, R. Hauser, *Ad.* 115; United Nations protection of, W. T. Coleman, *Rem.* 121; E. W. Debevoise, *Rem.* 128; B. B. Ferencz, *Rem.* 125; R. Hauser, *Ad.* 114, *Rem.* 125, 128, 129; K. Holloway, *Rem.* 127; K. L. Koh, *Rem.* 128; T. T. B. Koh, *Ad.* 119, *Rem.* 126; S. Liskofsky, *Rem.* 129; F. C. Newman, *Rem.* 106, 129, 130; E. R. Richardson, *Rem.* 125; E. Schwelb, *Rem.* 126, 127.
- Hunt, Cecil. Investment in developing countries. *Rem.* 105.
- Ijalaye, David A. Competence of U.N. General Assembly in maintenance of international peace. *Rem.* 55.
- Individual as subject of international law. D. W. Bowett, *Rem.* 60; R. Higgins, *Rem.* 60; C. Goldenberg, *Rem.* 60; S. Rosenne, *Rem.* 60.
- International adjudication. *See* Judicial settlement of international disputes.
- International Court of Justice. Effectiveness of advisory opinions, S. Rosenne, *Rem.* 59; litigation before: procedure, H. H. Bachrach, *Ad.* 245; suggested reforms, H. H. Bachrach, *Ad.* 248, *Rem.* 255; *Rem.* S. B. Cohen, 258; H. C. Dillard, 256, 259; E. A. Gross, 258, 259; H. E. Hensleigh, 257; R. Higgins, 256; E. Jiménez de Aréchaga, 258; I. Soubbotitch, 255; obiter dicta and effectiveness of judgments, H. H. Bachrach, *Ad.* 250, effect on resort to court, R. Higgins, *Rem.* 256; rules of evidence of, H. H. Bachrach, *Rem.* 255; rule of law and the settlement of international disputes, Secretary of State W. P. Rogers, *Ad.* 286.
- International Finance Corporation. Financing transnational investment. R. B. J. Richards, *Ad.* 87, *Rem.* 101, 102, 103, 104, 105; *Rem.* H. Fitzgibbon, 100, 102; C. T. Oliver, 101; F. M. Oppenheimer, 102; W. S. Surrey, 102; C. R. Wetzel, 100.
- International law:  
     Development of. The United Nations and lawmaking. D. W. Bowett, *Ad.* 48, *Rem.* 53, 54, 56, 58, 60; R. Higgins, *Ad.* 37, *Rem.* 54, 55, 58, 60, 61, 62; S. Rosenne,



- Ad*, 24, *Rem*, 53, 56, 59, 60, 61, 62, 63; *Rem*: S. Rhatt, 56; S. A. Bleicher, 54; J. Chacko, 62; M. Cohen, 62; S. B. Cohen, 53; W. Friedmann, 24, 59, 61; C. Goldenberg, 60; K. Holloway, 62; D. A. Ijalaye, 55; D. M. Johnston, 57; M. S. McDougal, 56; G. L. Morris, 52, 53; J. Picker, 63; L. B. Sohn, 61; J. Wolff, 61; Q. Wright, 52.
- Limits on regulation of extraterritorial commercial activity. I. N. P. Stokes. *Ad*, 135; *Rem*, 145, 146, 147.
- Settlement of international disputes and rule of. W. P. Rogers. *Ad*, 285.
- International Law Commission. Documents, Report of ASIL Committee on Publications, 305; rôle in U.N. lawmaking, S. B. Cohen, *Rem*, 53; S. Rosenne, *Ad*, 24, *Rem*, 53, 56, 59, 60, 61, 62, 63.
- International Legal Materials. Editor, 321; editorial advisory committee, 321; regulations, 342; report of Executive Director, 260.
- International litigation. Practical aspects. H. H. Bachrach, *Ad*, 245, *Rem*, 254, 255; J. Carey, *Ad*, 238, *Rem*, 254; H. P. deVries, *Ad*, 251, *Rem*, 254, 255; *Rem*: H. W. Baade, 255; A. Broches, 254; S. B. Cohen, 258; H. C. Dillard, 256, 259; C. Evan, 257; E. A. Gross, 238, 253, 254, 258, 259; H. E. Hensleigh, 257; R. Higgins, 256; E. Jiménez de Aréchaga, 258; I. Soubotitch, 255.
- International organization. Law of. Impact of U.N. structure, including specialized agencies. D. W. Bowett. *Ad*, 48; *Rem*, 53, 54, 56, 58, 60.
- International Technology Assessment Board. Proposed. D. Livingston, *Ad*, 168; C. F. Murphy, *Rem*, 185; A. Szalai, *Rem*, 187; C. L. Wilson, *Rem*, 184.
- Investment Disputes, Convention on Settlement of. A. Broches. *Rem*, 254.
- Investment, foreign. U.N. system and financing of. Blending public and private capital, R. B. J. Richards, *Ad*, 87, *Rem*, 101, 102, 103, 104, 105; Edge Act corporations' rôle, C. R. Wetzel, *Ad*, 91, *Rem*, 100, 101, 102, 104; restraints on direct investment, F. M. Oppenheimer, *Ad*, 94, *Rem*, 101, 102, 103, 104; *Rem*: S. B. Cohen, 104; D. M. Crawford, 103; T. J. Farer, 103; H. Fitzgibbon, 100, 102, 103, 104; C. Hunt, 105; C. T. Oliver, 87, 101; P. N. Schwartz, 102; W. S. Surrey, 102; P. D. Trooboff, 101, 103, 104.
- Israel. Maintenance of security, B. M. Becker, *Rem*, 86, Q. Wright, *Rem*, 86; neutralization of, D. Y. T. Lew, *Rem*, 84, E. V. Rostow, *Rem*, 85, Q. Wright, *Rem*, 84.
- Jackson, Elmore. United Nations and peacekeeping. *Rem*, 18, 19, 20, 21, 22, 23.
- Jenks, C. Wilfred. Quoted on science and technology in international relations. 172, 182.
- Jessup, Judge Philip C. International Law Moot Court Competition, 270; remarks at annual dinner, 284.
- Jiménez de Aréchaga, Judge Eduardo. Reform of procedure before I.C.J. *Rem*, 258.
- Johnston, Douglas M. Legal bases of Canadian action regarding Arctic waters, *Rem*, 57; regional organizations and environment, *Rem*, 235.
- Judicial settlement of international disputes. Practical aspects of international litigation. H. H. Bachrach, *Ad*, 245, *Rem*, 254, 255; J. Carey, *Ad*, 238, *Rem*, 254; H. P. deVries, *Ad*, 251, *Rem*, 254, 255; *Rem*: H. W. Baade, 255; A. Broches, 254; S. B. Cohen, 258; H. C. Dillard, 256, 259; C. Evan, 257; E. A. Gross, 238, 253, 254, 258, 259; H. E. Hensleigh, 257; R. Higgins, 256; E. Jiménez de Aréchaga, 258; I. Soubotitch, 255.
- Jurisdiction, national. Extraterritorial application of law. P. A. Bator, *Ad*, 141, *Rem*, 145, 146; H. Harfield, *Ad*, 130, *Rem*, 145; I. N. P. Stokes, *Ad*, 135, *Rem*, 145, 146, 147; *Rem*: M. Cohen, 145; S. Farrar, 146; V. C. Govindaraj, 145; H. E. Hensleigh, 146; P. J. Kozyris, 147; M. Leigh, 147; F. M. Oppenheimer, 146; W. S. Surrey, 146; P. D. Trooboff, 147; B. Yanakakis, 146.
- Kennan, George. To Prevent a World Wasteland. Cited, 179, 213, 228, 231, 234; quoted, 179.
- Koh, Kwang Lim. China and nuclear disarmament, *Rem*, 208; rôle of Human Rights Commission in protection of human rights, *Rem*, 128.
- Koh, Ambassador T. T. B. Human rights petitions, *Rem*, 126; United Nations law on racial discrimination, *Ad*, 119.
- Kozyris, P. John. Extraterritorial effect of State tender offer statutes. *Rem*, 147.
- Lasswell, Harold D. Elected president of ASIL, 265; the United Nations and science, *Rem*, 147.
- Lasswell, Harold D., and D. Lerner. The Policy Sciences. A. Szalai. *Ad*, 159.

- Law. Extraterritorial application. General principles, H. Harfield, *Ad*, 130, *Rem*, 145; limits imposed by international law, I. N. P. Stokes, *Ad*, 135, *Rem*, 145, 146, 147; United States securities laws, P. A. Bator, *Ad*, 141, *Rem*, 145, 146; *Rem*: M. Cohen, 145; S. Farrar, 146; V. C. Govindaraj, 145; H. E. Hensleigh, 146; P. J. Kozyris, 147; M. Leigh, 147; F. M. Oppenheimer, 146; W. S. Surrey, 146; P. D. Trooboff, 147; B. Yanakakis, 146.
- Lawmaking. And dissenting minorities, D. W. Bowett, *Ad*, 49, *Rem*, 58; R. Higgins, *Ad*, 41, *Rem*, 58; M. S. McDougal, *Rem*, 56; S. Rosenne, *Rem*, 59; unilateral, D. M. Johnston, *Rem*, 234; M. S. McDougal, *Rem*, 233.
- United Nations and: Impact of U. N. structure, including specialized agencies, on law of international organization, D. W. Bowett, *Ad*, 48, *Rem*, 53, 54, 56, 58, 60; International Law Commission rôle, S. Rosenne, *Ad*, 24, *Rem*, 53, 56, 59, 60, 61, 62, 63; political organs of the United Nations, R. Higgins, *Ad*, 37, *Rem*, 54, 55, 58, 60, 61, 62; *Rem*: S. Bhatt, 56; S. A. Bleicher, 54; J. Chacko, 62; M. Cohen, 62; S. B. Cohen, 53; W. Friedmann, 24, 59, 61; C. Goldenberg, 60; K. Holloway, 62; D. C. Ijalaye, 55; D. M. Johnston, 57; M. S. McDougal, 56; G. L. Morris, 52, 53; J. Picker, 63; L. B. Sohn, 61; J. Wolff, 61; Q. Wright, 52.
- Lawson, Ruth C. Legal aspects of search for peace in the Middle East. *Rem*, 82.
- Leigh, Monroe. Expropriation by Bolivia of oil in Chile and rule in Sabbatino case. *Rem*, 147.
- Lew, Daniel Y. T. Neutralization of Israel. *Rem*, 84.
- Lipson, Leon. Strategic arms limitation talks, U. S.-U.S.S.R., *Rem*, 205, 206; U. N. rôle in Treaty on Non-Proliferation of Nuclear Weapons, *Rem*, 204; U. S. position on use of chemical and biological weapons, *Rem*, 203, 204.
- Liskofsky, Sidney. Complaints procedure regarding racial discrimination. *Rem*, 129.
- Livingston, Dennis. International technology assessment and the U.N. system. *Ad*, 163; *Rem*, 163.
- McCloy-Zorin agreement on complete and general disarmament. A. S. Fisher, *Rem*, 207; Q. Wright, *Ad*, 76, *Rem*, 207.
- McDougal, Myres S. Canadian unilateral action regarding pollution of Arctic waters, *Rem*, 56, 57; development of international law, *Rem*, 56; the United Nations and environmental problems, *Rem*, 233.
- McRae, Donald. The United Nations and the environment. *Ad*, 227.
- McWhinney, Edward. Canadian action regarding pollution of Arctic waters. *Rem*, 234.
- Middle East. The United Nations and the legal aspects of the search for peace. E. V. Rostow, *Ad*, 64, *Rem*, 78, 79, 80, 82, 83, 85, 86; Q. Wright, *Ad*, 71, *Rem*, 78, 79, 80, 81, 82, 84, 85, 86; *Rem*: J. J. Barceló III, 79, 80, 81; B. M. Becker, 86; S. Bhatt, 86; M. Domke, 81; A. El Erian, 83; V. L. Ferwerda, 82; R. D. Fisher, 79; R. C. Lawson, 82; D. Y. T. Lew, 84; J. N. Moore, 84; M. Mughraby, 85; A. J. Multer, 83; I. Nakhleh, 85; G. Obiozor, 84; M. P. Persico, 86; F. Sakran, 82; S. P. Sinha, 85; R. W. Tucker, 78, 79.
- See also Arab states-Israel.
- Miller, Lynn. United Nations and peacekeeping. *Rem*, 19.
- Moore, John Norton. Legal aspects of the search for peace in the Middle East. *Rem*, 84.
- Morris, Gerald L. Canadian action with regard to pollution of Arctic waters, *Rem*, 52; U. N. machinery for development of international law, *Rem*, 52.
- Mughraby, Muhammad. Palestinian Arabs and self-determination. *Rem*, 85.
- Multer, Judge Abraham J. The United Nations and the search for peace in the Middle East. *Rem*, 83.
- Murphy, Cornelius F. International technology assessment agency, *Rem*, 185; population control, technology and science, *Rem*, 186; United Nations peacekeeping and peacemaking, *Rem*, 21.
- Nakhleh, I. Legal aspects of the search for peace in the Middle East. *Rem*, 85.
- Nanda, Ved P. Regional arrangements and United Nations peacekeeping, *Rem*, 18; the United Nations and environment, *Rem*, 235.
- Newman, Frank C. United Nations law and racial discrimination. Introductory outline, 106; *Rem*, 106, 110, 114, 118, 119, 120, 129, 130.
- Nominating Committee. 321, 331; election, 266; regulations, 340; report, 265.
- North Sea Continental Shelf cases, I.C.J. Cited. 249.

Nuclear disarmament and environment. R. A. Falk, *Ad*, 218, *Rem*, 237; F. Sarguis, *Rem*, 236.

Nuclear weapons:

Legality. M. H. Halperin, *Rem*, 209; Q. Wright, *Rem*, 209, 210; Soviet position, A. S. Fisher, *Rem*, 210, S. C. Yuter, *Rem*, 210.

Limitation and prohibition. Outer Space Treaty, A. S. Fisher, *Rem*, 210; M. H. Halperin, *Rem*, 208; F. Smedley, *Rem*, 208, 210; C. N. Van Doren, *Rem*, 209, 210; prospects for SALT, M. H. Halperin, *Ad*, 200, *Rem*, 205, 206, 207, 208; the U. N. and the Treaty on Non-Proliferation, C. N. Van Doren, *Ad*, 191, *Rem*, 204, 206, 209; *Rem*: B. H. Becker, 207; A. S. Fisher, 190, 204, 206, 207, 208; K. L. Koh, 208; L. Lipson, 204, 205; S. C. Yuter, 207, 210.

Tests. Treaty banning. Violations of. A. S. Fisher, *Rem*, 206; M. H. Halperin, *Rem*, 206; L. Lipson, *Rem*, 206.

Obiozor, George. Legal aspects of the search for peace in the Middle East. *Rem*. 84.

Oliver, Covey T. Financing transnational investment. *Rem*. 87, 101.

Oppenheimer, Franz M. Financing transnational investment. Restraints on direct investment, *Ad*, 94; *Rem*, 101, 103; U. S. Treasury regulations on foreign assets and transactions, *Rem*, 146.

Organization of American States. And U.N. peacekeeping. L. L. Fabian, *Rem*, 18; I. J. Rikhye, *Rem*, 18.

Outer Space, Treaty banning Nuclear Weapons in. A. S. Fisher, *Rem*, 210; M. H. Halperin, *Rem*, 208; F. Smedley, *Rem*, 208, 210; C. N. Van Doren, *Rem*, 209, 210.

Pacta sunt servanda. The rule of law and the settlement of international disputes. Secretary of State W. P. Rogers. *Ad*. 289.

Palestinian Arabs. Attitude toward Israel, M. Muhraby, *Rem*, 85, I. Nakhleh, *Rem*, 85, Q. Wright, *Ad*, 77, *Rem*, 82; nationality of, V. L. Ferwerda, *Rem*, 82, 85, E. V. Rostow, *Rem*, 82, Q. Wright, *Rem*, 82.

Peaceful settlement of international disputes. The rule of law and, Secretary of State W. P. Rogers, *Ad*, 285; U.N. peacekeeping and, L. L. Fabian, *Rem*, 21, 22; A. Fraleigh, *Rem*, 22, 23; E. Jackson, *Rem*, 20, 21, 22; C. F. Murphy, Jr., *Rem*, 21; D. H. Popper, *Ad*, 9, *Rem*, 20, 21, 23; J. Stegenga, *Rem*, 20.

Peacekeeping. United Nations and. L. L. Fabian, *Ad*, 9; D. H. Popper, *Ad*, 1; *Rem*: R. L. Bard, 21; C. Q. Christol, 19; R. Donovan, 18; L. L. Fabian, 18, 19, 21, 22, 24; A. Fraleigh, 22, 23; F. B. Gross, 23; P. Hansen, 23; E. Jackson, 18, 19, 20, 21, 22, 23; L. Miller, 19; C. F. Murphy, 21; V. P. Nanda, 18; D. H. Popper, 17, 18, 19, 20, 21, 22, 23, 24; I. J. Rikhye, 16, 18, 20, 22, 23, 24; J. Stegenga, 20; J. R. Williams, 22; B. Yanakakis, 21.

Persico, Michael P. Legal aspects of the search for peace in the Middle East. *Rem*. 86.

Picker, Jane. Third-party rights in treaty law. *Rem*. 63.

Pillai, K. G. J. International science and technology agency. *Rem*. 185.

Poison gas and germ warfare. Geneva Protocol of 1925, G. Bunn, *Ad*, 194, interpretation by U.N. General Assembly, S. A. Bleicher, *Rem*, 54, R. Higgins, *Rem*, 54; U.N. rôle in banning of, G. Bunn, *Ad*, 194.

Popper, Ambassador David H. Lessons of United Nations peacekeeping in Cyprus, *Ad*, 1, *Rem*, 17, 21, 22; regional organizations and U.N. peacekeeping, *Rem*, 18.

Private international law. *See* Conflict of laws.

Racial discrimination:

Committee on Elimination of. Powers. R. Hauser, *Rem*, 128; S. Liskofsky, *Rem*, 129; E. R. Richardson, *Ad*, 111, *Rem*, 129.

Convention on Elimination of, 1965. R. Hauser, *Ad*, 117, *Rem*, 128; K. Holloway, *Rem*, 128; S. Liskofsky, *Rem*, 129; F. C. Newman, *Rem*, 106; E. R. Richardson, *Ad*, 111, *Rem*, 127, 129; E. Schwelb, *Rem*, 126; reservations to, K. Holloway, *Rem*, 128; E. R. Richardson, *Ad*, 111, *Rem*, 127; E. Schwelb, *Rem*, 126.

United Nations law on. R. Hauser, *Ad*, 114, *Rem*, 123, 125, 126, 128, 129; T. T. B. Koh, *Ad*, 119, *Rem*, 126; F. C. Newman, *Rem*, 106, 110, 114, 118, 119, 120, 129, 130; E. R. Richardson, *Ad*, 110, *Rem*, 123, 125, 127, 129; *Rem*: W. T. Coleman, 121; E. W. Debevoise, 128; B. B. Ferencz, 125; K. Holloway, 127, 128; K. L. Koh, 128; S. Liskofsky, 128; E. Schwelb, 126, 127; S. P. Sinha, 126.

Refugees. Arab-Israeli conflict and. G. Obiozor, *Rem*, 84; E. V. Rostow, *Rem*, 82, 85; F. Sakran, *Rem*, 82; Q. Wright, *Rem*, 82.

- Regional organizations. Environment protection by, J. Chacko, *Rem*, 233, D. Johnston, *Rem*, 235, R. E. Stein, *Rem*, 224, 233, C. L. Wilson, *Rem*, 184; human rights protection by, R. Hauser, *Ad*, 117, *Rem*, 124; relation to U.N. in lawmaking, D. W. Bowett, *Rem*, 54, S. B. Cohen, *Rem*, 53, R. Higgins, *Rem*, 54; U.N. peacekeeping and, L. L. Fabian, *Rem*, 18, P. Hansen, *Rem*, 23, V. P. Nanda, *Rem*, 18, D. H. Popper, *Ad*, 9, *Rem*, 18, 24, I. J. Rikhye, *Rem*, 18, 24.
- Richards, R. B. J. Transnational investment. Blending public and private capital. *Ad*, 87; *Rem*, 101, 102, 103, 104, 105.
- Richardson, Ambassador Egerton R. Will the rapidly accumulating body of U.N. law on racial discrimination truly be effective? *Ad*, 110; *Rem*, 123, 125, 127, 129.
- Rikhye, Major General Indarjit. United Nations and peacekeeping, *Rem*, 16, 18, 20, 22, 23, 24; Organization of American States and peacekeeping in the Dominican Republic, *Rem*, 18.
- Robinson, Nicholas A. Developing nations and environment problems, *Rem*, 236; scientists and environment problems, *Rem*, 236.
- Rogers, Secretary of State William P. Address on Middle East peace, Dec. 9, 1969, cited, 78, 79, quoted, 76; the rule of law and the settlement of international disputes, *Ad*, 285.
- Rosenne, Shabtai. The International Law Commission rôle in U.N. lawmaking, *Ad*, 24, *Rem*, 53, 63; lawmaking and dissenting minorities, *Rem*, 59, 61; U.N. resolutions as evidence of international law, *Rem*, 56.
- Rostow, Eugene V. Legal aspects of the search for peace in the Middle East. *Ad*, 64; *Rem*, 78, 79, 80, 82, 83, 85, 86.
- Russell, Ruth B. International and national measures on environment. *Rem*, 235.
- Sabbatino case. Application of rule to Bolivian expropriation case. M. Leigh, *Rem*, 147; I. N. P. Stokes, *Rem*, 147.
- Sakran, Frank. Refugee question in Arab-Israeli conflict. *Rem*, 82.
- Sarguis, Francis. Nuclear disarmament and environment. *Rem*, 236.
- Schachter, Oscar. Access to U.N. documents, *Rem*, 263, 264; Ford Foundation grant to ASIL, *Rem*, 261; the future of the United Nations, *Ad*, 277; Report of ASIL Committee on Publications of Department of State and the United Nations, *Rem*, 263; Towards a Theory of International Obligation, quoted, 161, 162, A. Szalai, *Ad*, 161.
- Schoenbaum v. Firstbrook, 405 F. 2d 200, 215. Quoted, 143, 144; P. A. Bator, *Ad*, 143.
- Schwartz, Pushpa N. Investing in developing countries through tax payments. *Rem*, 102.
- Schwebel, Stephen M. Ford Foundation grant to ASIL, *Rem*, 262; Report as Executive Director, 260; survey of membership of ASIL, *Rem*, 267.
- Schwebel, Egon. Periodical literature section of AJIL, *Rem*, 269; proposed ASIL resolution on documentation of U.N. Committee on Elimination of Racial Discrimination, *Rem*, 263, 264; U.N. action in racial discrimination field, *Rem*, 127, Convention on Elimination of All Forms of Racial Discrimination, *Rem*, 126, reservations to, *Rem*, 126.
- Science. The United Nations and. M. E. Caldwell, *Ad*, 172, *Rem*, 171, 186, 188; D. Livingston, *Ad*, 163, *Rem*, 163; A. Szalai, *Ad*, 148, *Rem*, 187; *Rem*: S. Bhatt, 188; G. Brand, 188; V. L. Ferwerda, 188; J. M. Goldsen, 186; J. Hanessian, Jr., 189; H. D. Lasswell, 147; C. F. Murphy, 185; K. G. J. Pillai, 185; C. L. Wilson, 183, 187, 188.
- Science and technology. Application to development, U.N. Advisory Committee, C. L. Wilson, *Rem*, 183, 187, 188; work of U.N. Secretariat, J. Hanessian, Jr., *Rem*, 189.
- Scientific and technological developments. Human rights and. G. Brand. *Rem*, 188.
- Self-determination. Application of principle in settlement of Arab-Israeli conflict. M. Mughraby, *Rem*, 85; Q. Wright, *Rem*, 85.
- Sinha, Bhikpati. Disarmament of small countries. *Rem*, 206.
- Sinha, S. Prakash. Arab-Soviet territorial expansion in the Middle East, *Rem*, 85; petitions to U.N. Human Rights Commission, *Rem*, 126.
- Smedley, Frederic. Violation of Outer Space Treaty by exploding nuclear weapons. *Rem*, 208, 210.
- Social and behavioral sciences. The United Nations and. A. Szalai, *Ad*, 148, *Rem*, 187; J. M. Goldsen, *Rem*, 186.

- Sohn, Louis B. Creation of customary international law by the United Nations. *Rem.* 61.
- Soubbotitch, Ivan. Enforceability of arbitral award, *Rem.* 255; procedural rules of the I.C.J., *Rem.* 255.
- South West Africa Cases, I.C.J. Cited. 250, 257, 258.
- Spillcott, George. Canadian action with regard to the waters of the Arctic. *Rem.* 232.
- States. Extraterritorial application of laws. P. A. Bator, *Ad.* 141, *Rem.* 145, 146; H. Harfield, *Ad.* 130, *Rem.* 145; I. N. P. Stokes, *Ad.* 135, *Rem.* 145, 146, 147; *Rem.* M. Cohen, 145; S. Farrar, 146; V. C. Govindaraj, 145; H. E. Hensleigh, 146; P. J. Kozyris, 147; M. Leigh, 147; F. M. Oppenheimer, 146; W. S. Surrey, 146; P. D. Trooboff, 147; B. Yanakakis, 146.
- Stegenga, James. United Nations peacekeeping and peacemaking. *Rem.* 20.
- Stein, Robert E. Regional organizations and environment protection. *Rem.* 224.
- Stockholm Conference on Environment, 1972. T. B. Atkeson, *Ad.* 226; M. E. Caldwell, *Ad.* 182; R. N. Gardner, *Rem.* 211, 214, 237; C. Herter, Jr., *Rem.* 214, 237.
- Stokes, Isaac N. P. Limits imposed by international law on regulation of extraterritorial commercial activity. *Ad.* 135; *Rem.* 145, 146, 147.
- Strategic arms limitation talks (SALT). Prospects for. M. H. Halperin, *Ad.* 200, *Rem.* 205, 206, 207, 210; *Rem.* G. Bunn, 205; A. S. Fisher, 199, 208; L. Lipson, 205.
- Student International Law Societies, Association of. Meeting of, and annual meeting of ASIL, P. D. Trooboff, *Rem.* 268; President's Report, 315.
- Surrey, Walter Sterling. Extraterritorial application of U. S. law to Canada, *Rem.* 146; International Finance Corporation and foreign investment, *Rem.* 102.
- Szalai, Alexander. The United Nations and the social and behavioral sciences. *Ad.* 148; *Rem.* 187.
- Tear gas. Use in war. G. Bunn, *Ad.* 195, 196, 198, *Rem.* 203, 204, 209; L. Lipson, *Rem.* 203, 204; J. R. Williams, *Rem.* 209; Geneva Protocol of 1925 and, U. S. position, G. Bunn, *Ad.* 195, 196, 198, *Rem.* 203, 204, L. Lipson, *Rem.* 203, 204.
- Technology assessment, international, and the United Nations system. D. Livingston, *Ad.* 163, *Rem.* 163; C. F. Murphy, *Rem.* 185; C. L. Wilson, *Rem.* 183.
- Territory, Acquisition by force. J. J. Barceló III, *Rem.* 79; S. Bhatt, *Rem.* 86; A. El Erian, *Rem.* 83; I. Nakhleh, *Rem.* 85; E. V. Rostow, *Ad.* 69, *Rem.* 78, 80; Q. Wright, *Ad.* 74, *Rem.* 78, 80, 86.
- Treaties. Lawmaking, the rule of law and settlement of international disputes, Secretary of State W. P. Rogers, *Ad.* 288; reservations to, K. Holloway, *Rem.* 62, 128, S. Rosenne, *Rem.* 59, 62; third parties and, J. Picker, *Rem.* 63, S. Rosenne, *Rem.* 63.
- Trooboff, Peter D. Development banks and international investment, *Rem.* 101; extraterritorial application of U. S. Treasury regulations, *Rem.* 147; foreign direct investment regulations, *Rem.* 103, 104.
- Tucker, Robert W. Israeli obligations as occupying Power in Arab territory, *Rem.* 79; U.N. Security Council Resolution of Nov. 22, 1967, on peace in the Middle East, *Rem.* 78.
- Turrettini, Ambassador Bernard. Remarks on acceptance of Hudson Medal on behalf of Paul Guggenheim. 273.
- U Thant, Secretary General of the United Nations. Message to ASIL. 276.
- Union of Soviet Socialist Republics. Position on legality of nuclear weapons, A. S. Fisher, *Rem.* 210, Y. C. Yuter, *Rem.* 210; rôle in Arab-Israeli conflict, M. P. Persico, *Rem.* 86, E. V. Rostow, *Ad.* 64, 70, *Rem.* 82, 85, 86, S. P. Sinha, *Rem.* 85, Q. Wright, *Ad.* 72, 77, *Rem.* 86.
- Union of Soviet Socialist Republics-United States. Strategic arms limitation agreement. Prospects for. M. H. Halperin, *Ad.* 200, *Rem.* 208; *Rem.* B. M. Becker, 207; A. S. Fisher, 199, 208.
- United Nations:
- Disarmament and. G. Bunn, *Ad.* 194, *Rem.* 203, 204, 205, 209; M. H. Halperin, *Ad.* 200, *Rem.* 205, 206, 207, 208, 209, 210; C. N. Van Doren, *Ad.* 191, *Rem.* 204, 206, 209, 210; *Rem.* B. M. Becker, 207; A. S. Fisher, 190, 199, 204, 206, 207, 208, 210; K. L. Koh, 208; L. Lipson, 203, 204, 205, 206; B. P. Sinha, 206; F. Smedley, 208, 210; J. R. Williams, 209; Q. Wright, 207, 209, 210; S. C. Yuter, 207, 210.
  - Documents: Access to. Report of ASIL Committee, 301; J. Carey, *Rem.* 263, 264; M. Cohen, *Rem.* 264; O. Schachter, *Rem.* 263, 264.

- The environment and. T. B. Atkeson, *Ad*, 226; R. A. Falk, *Ad*, 217, *Rem*, 230, 237; R. N. Gardner, *Ad*, 211, *Rem*, 230, 232, 237; C. Herter, Jr., *Rem*, 214, 231, 234, 235, 237; D. McRae, *Ad*, 227; *Rem*: S. Bleicher, 235; J. Chacko, 233; C. Q. Christol, 232; R. D. Fisher, 236; J. Fried, 234, W. Friedmann, 230; G. Gottlieb, 236; E. Hambro, 231; D. M. Johnston, 234; M. S. McDougal, 233; E. McWhinney, 234; V. P. Nanda, 235; N. A. Robinson, 236; R. B. Russell, 235; F. Sarguis, 236; G. Spillcott, 232; R. E. Stein, 233.
- Financing transnational investment and. F. M. Oppenheimer, *Ad*, 94, *Rem*, 101, 102, 103, 104; R. B. J. Richards, *Ad*, 87, *Rem*, 101, 102, 103, 104, 105; C. R. Wetzel, *Ad*, 91, *Rem*, 100, 101, 102, 104; *Rem*: S. B. Cohen, 104; D. M. Crawford, 103; T. J. Farer, 103; H. Fitzgibbon, 100, 102, 103, 104; C. Hunt, 105; C. T. Oliver, 87, 101; P. N. Schwartz, 102; W. S. Surrey, 102; P. D. Trooboff, 101, 103, 104.
- The future of. O. Schachter. *Ad*, 277.
- Human Rights Commission. Access to documentation, report of ASIL Committee, 301; petitions to, R. Hauser, *Ad*, 116, *Rem*, 123, 126, T. T. B. Koh, *Ad*, 120, *Rem*, 126, S. Prakash Sinha, *Rem*, 126; rôle in promoting human rights, K. L. Koh, *Rem*, 128.
- Human Rights Division, Human Rights and Scientific and Technological Developments. G. Brand. *Rem*, 188.
- International Law Commission. *See* International Law Commission.
- International technology assessment and. D. Livingston, *Ad*, 163, *Rem*, 163; C. L. Wilson, *Rem*, 183.
- Lawmaking. Impact of U.N. structure, including specialized agencies on law of international organization, D. W. Bowett, *Ad*, 48, *Rem*, 53, 54, 56, 58, 60; International Law Commission rôle, S. Rosenne, *Ad*, 24, *Rem*, 53, 56, 59, 60, 61, 62, 63; political organs of the United Nations, R. Higgins, *Ad*, 37, *Rem*, 54, 55, 58, 60, 61, 62; *Rem*: S. Bhatt, 56; S. A. Bleicher, 54; J. Chacko, 62; M. Cohen, 62; S. B. Cohen, 53; W. Friedmann, 24, 59, 61; C. Goldenberg, 60; K. Holloway, 62; D. A. Ijalaye, 55; D. M. Johnston, 57; M. S. McDougal, 56; G. L. Morris, 52, 53; J. Picker, 63; L. B. Sohn, 61; J. Wolff, 61; Q. Wright, 52.
- Middle East. Legal aspects of search for peace. E. V. Rostow, *Ad*, 64, *Rem*, 78, 79, 80, 82, 83, 85, 86; Q. Wright, *Ad*, 71, *Rem*, 78, 79, 80, 81, 82, 84, 85, 86; *Rem*: J. J. Barceló III, 79, 80, 81; B. M. Becker, 86; S. Bhatt, 86; M. Domke, 81; A. El Erian, 83; V. L. Ferwerda, 82; R. D. Fisher, 79; R. C. Lawson, 82; D. Y. T. Lew, 84; J. N. Moore, 84; M. Mughraby, 85; A. J. Multer, 83; I. Nakhleh, 85; G. Obiozor, 84; M. P. Persico, 86; F. Sakran, 82; S. P. Sinha, 85; R. W. Tucker, 78, 79.
- Peacekeeping. Cyprus, lessons of, D. H. Popper, *Ad*, 1, *Rem*, 17-24; some perspectives on peacekeeping institutions, L. L. Fabian, *Ad*, 9, *Rem*, 18, 19, 21, 22, 24; *Rem*: R. L. Bard, 21; C. Q. Christol, 19; R. Donovan, 18; A. Fraleigh, 22, 23; F. B. Gross, 23; P. Hansen, 23; E. Jackson, 18, 19, 20, 21, 22, 23; L. Miller, 19; C. F. Murphy, 21; V. P. Nanda, 18; I. J. Rikhye, 16, 18, 20, 22, 23, 24; J. Stegenga, 20; J. R. Williams, 22; B. Yanakakis, 21.
- Periodical publications. Report of ASIL Committee. 308.
- Politician organs. Rôle in lawmaking. R. Higgins. *Ad*, 37; *Rem*, 54, 55, 58, 60, 61, 62.
- Publications. ASIL resolution, 265; committee, 322, regulations, 339, report, 263, 293; *Rem*: J. Carey, 263; 264; M. Cohen, 264; O. Schachter, 263.
- Racial discrimination law. R. Hauser, *Ad*, 114, *Rem*, 123, 125, 126, 128, 129; T. T. B. Koh, *Ad*, 119, *Rem*, 126; F. C. Newman, introductory outline, 106, *Rem*, 106; E. R. Richardson, *Ad*, 110, *Rem*, 123, 125, 127, 129; *Rem*: W. T. Coleman, 121; E. W. Debevoise, 128; E. B. Ferencz, 125; K. Holloway, 127, 128; K. L. Koh, 128; S. Liskofsky, 129; F. C. Newman, 110, 114, 118, 119, 120, 129, 130; E. Schwelb, 126, 127; S. P. Sinha, 126.
- Committee on Elimination of Racial Discrimination. Documentation. Report of ASIL Committee, 302; ASIL resolution, 265; J. Carey, *Rem*, 263, 264; O. Schachter, *Rem*, 263; E. Schwelb, *Rem*, 263.
- Resolutions as evidence of international law. S. Bhatt, *Rem*, 56; S. A. Bleicher, *Rem*, 54; D. W. Bowett, *Rem*, 56; R. Higgins, *Ad*, 39, *Rem*, 54, 62; K. Holloway, *Rem*, 62; D. A. Ijalaye, *Rem*, 55; S. Rosenne, *Rem*, 56.
- Rôle in banning poison gas and germ warfare, G. Bunn, *Ad*, 194; in conclusion of Treaty on Non-Proliferation of Nuclear Weapons, C. N. Van Doren, *Ad*, 191.
- Science and. M. E. Caldwell, *Ad*, 172, *Rem*, 171, 186, 188; D. Livingston, *Ad*, 163, *Rem*, 163; A. Szalai, *Ad*, 148, *Rem*, 187; *Rem*: S. Bhatt, 188; G. Brand, 188; V. L. Ferwerda, 188; J. M. Goldsen, 186; J. Hanessian, Jr., 189; H. D. Lasswell, 147; C. F. Murphy, 185; K. G. J. Pillai, 185; C. L. Wilson, 183, 187, 188.
- Science and technology agency. Proposed. M. E. Caldwell. *Ad*, 176, 177, 179; K. G. J. Pillai, *Rem*, 185; C. L. Wilson, *Rem*, 184.

- Specialized Agencies. Documentation. Report of ASIL Committee. 312.  
 University. Proposed. M. E. Caldwell, *Ad*, 178; A. Szalai, *Ad*, 153.  
 What litigators should know about. J. Carey. *Ad*. 238.
- United Nations Charter. Art. 51 on self-defense against armed attack. Arab-Israeli hostilities and. J. J. Barceló III, *Rem*, 80; A. El Erian, *Rem*, 83; E. V. Rostow, *Ad*, 67, *Rem*, 80; Q. Wright, *Ad*, 74, *Rem*, 80.
- United Nations Economic and Social Council. Advisory Committee on Application of Science and Technology to Development. C. L. Wilson. *Rem*. 183, 187, 188.
- United Nations force. Arab-Israeli conflict and. J. J. Barceló III, *Rem*, 81; A. J. Multer, *Rem*, 83; E. V. Rostow, *Ad*, 67; Q. Wright, *Ad*, 72, 73, 75, *Rem*, 78, 81, 84, 86.  
*See* United Nations peacekeeping.
- United Nations General Assembly. Resolution interpreting Geneva Protocol on Chemical and Biological Warfare, S. A. Bleicher, *Rem*, 54, R. Higgins, *Rem*, 54; Resolution on Reservations to Multilateral Conventions, R. Higgins, *Rem*, 62, K. Holloway, *Rem*, 62, S. Rosenne, *Rem*, 62; Resolution on Uniting for Peace, R. Higgins, *Rem*, 55, D. A. Ijalaye, *Rem*, 55; Special Committee on Peacekeeping Operations, L. L. Fabian, *Ad*, 11, 14, 16, *Rem*, 19, E. Jackson, *Rem*, 23, D. H. Popper, *Ad*, 9, I. J. Rikhye, *Rem*, 17.
- United Nations Institute for Training and Research. A. Szalai. *Ad*. 150, 152, 154.
- United Nations Secretary General. Message to ASIL. 276.
- United Nations Security Council. Res. 242 of Nov. 22, 1967, on principles for peace in the Middle East. Quoted, 67, 68; J. J. Barceló III, *Rem*, 79, 80; A. El Erian, *Rem*, 83; R. D. Fisher, *Rem*, 79; E. V. Rostow, *Ad*, 65, 68, *Rem*, 78, 79, 80, 83, 85; R. W. Tucker, *Rem*, 78; Q. Wright, *Ad*, 73, *Rem*, 78, 79, 80; Secretary of State W. P. Rogers cited on, 78, 79, quoted, 76.
- United States:  
 Edge Act corporations. Role in transnational financing. C. R. Wetzel. *Ad*, 91; *Rem*, 101, 102, 104; *Rem*: H. Fitzgibbon, 100; C. T. Oliver, 101; F. M. Oppenheimer, 103.  
 Environment control measures. C. Herter, Jr., *Rem*, 235, 237; R. Russell, *Rem*, 235.  
 Foreign direct investment controls. H. Fitzgibbon, *Rem*, 100; F. M. Oppenheimer, *Ad*, 94, *Rem*, 101, 103; P. D. Trooboff, *Rem*, 103, 104.  
 Foreign Relations. Publication of. ASIL Committee Report, 263, 293, resolution, 264; J. Carey, *Rem*, 263; M. H. Cardozo, *Rem*, 264.  
 Position on Geneva Protocol of 1925, G. Bunn, *Ad*, 194; on use of tear gas in war, G. Bunn, *Ad*, 195, 196, 198, *Rem*, 203, 204, 209; L. Lipson, *Rem*, 203, 204; J. R. Williams, *Rem*, 209.  
 Securities Exchange Act, 1934. Extraterritorial application. P. A. Bator. *Ad*, 141; *Rem*, 145, 146.  
 Treasury regulations. Application to foreign assets and transactions. S. Farrar, *Rem*, 146; F. M. Oppenheimer, *Rem*, 146; I. N. P. Stokes, *Ad*, 140, *Rem*, 146; P. D. Trooboff, *Rem*, 147.  
 Treaties and Other International Acts Series. Publication of. Report of ASIL Committee. 297.  
 Treaties and Other International Agreements 1776-1949. Publication of. Report of ASIL Committee. 297.  
 United Nations human rights law in. W. T. Coleman, *Rem*, 121; R. Hauser, *Ad*, 117; F. C. Newman, *Rem*, 121.
- United States Congress. Reports, publication of. ASIL Committee Report. 298.
- United States State Department. Publications. ASIL Committee on, 322, regulations, 339, report, 263, 293; O. Schachter, *Rem*, 263; ASIL resolution, 264, M. H. Cardozo, *Rem*, 264.
- Van Doren, Charles N. United Nations rôle in disarmament: the Non-Proliferation Treaty, *Ad*, 191, *Rem*, 204, 206; nuclear weapons in outer space treaty, *Rem*, 209, 210.
- Verzijl, J. H. W. ASIL annual award to. 262.
- War, laws of. Nuclear weapons and, Q. Wrights, *Rem*, 209; violations during World War II, Q. Wright, *Rem*, 209, 210.
- Warfare. Chemical and biological. U. N. rôle in banning. G. Bunn. *Ad*. 194.  
*See* Poison gas and Tear gas.

- Westphalia, Peace of, 1648. State system of order. R. A. Falk, *Ad*, 217, *Rem*, 230; W. Friedmann, *Rem*, 231; E. Hambro, *Rem*, 232; M. S. McDougal, *Rem*, 233; F. Sarguis, *Rem*, 236.
- Wetzel, Carroll R. The rôle of Edge Act corporations in transnational financing. *Ad*, 91; *Rem*, 101, 102, 104.
- Whiteman, Digest of International Law. Publication of. Report of ASIL Committee. 294.
- Williams, John R. Peacekeeping and self-defense, *Rem*, 22; use of tear gas in war, *Rem*, 209.
- Wilson, Carroll L. The United Nations and science. *Rem*. 183, 187, 188.
- Wolf, John. Binding nature of customary international law. *Rem*. 61.
- Wright, Quincy. Development of international law, *Rem*, 52; the McCloy-Zorin agreement on general and complete disarmament, *Ad*, 76, *Rem*, 207; the Middle Eastern crisis, *Ad*, 71, *Rem*, 73-82, 84-86; nuclear bombing and the laws of war, *Rem*, 209, 210.
- Yanakakis, Basil. Concept of sovereignty, *Rem*, 146; United Nations peacekeeping and the great Powers, *Rem*, 21.
- Young, Richard. Report of Committee on Annual Awards. 262.
- Yuter, S. C. Soviet position on use of nuclear weapons, *Rem*, 210; U. S.-Soviet strategic arms limitation negotiations and Soviet-Chinese relations, *Rem*, 207.



## CORPORATE MEMBERS

Arabian American Oil Company, Dhahran, Saudi Arabia.  
Asiatic Petroleum Corporation, 1 Rockefeller Plaza, New York, N. Y. 10020.  
Bache & Co., Incorporated, 36 Wall Street, New York, N. Y. 10005.  
Bethlehem Steel Corporation, Bethlehem, Pennsylvania 18016.  
Harvey Aluminum (Incorporated), 19200 South Western Avenue, Torrance, California 90509.  
International Nickel Company, Inc., 67 Wall Street, New York, N. Y. 10005.  
Mobil Oil Corp., 150 East 42nd Street, New York, N. Y. 10017.  
J. Henry Schroder Banking Corporation, 57 Broadway, New York, N. Y. 10006.  
Standard Oil Company (New Jersey), 30 Rockefeller Plaza, New York, N. Y. 10020.  
Standard Oil of California, 225 Bush Street, San Francisco, California 94104.  
Texaco, Inc., 135 East 42nd Street, New York, N. Y. 10017.  
United States Steel Corporation, 71 Broadway, New York, N. Y. 10006.

## ANNUAL PATRONS OF THE SOCIETY

Alcoa Foundation, Alcoa Building, Pittsburgh, Pa. 15219.  
The Babcock & Wilcox Company, 161 East 42nd Street, New York, N. Y. 10017.  
Bank of New York, 48 Wall Street, New York, N. Y. 10005.  
Blyth & Co., Inc., 14 Wall Street, New York, N. Y. 10005.  
Chemical Bank, 20 Pine Street, New York, N. Y. 10005.  
Chrysler Corporation, 341 Massachusetts Avenue, Detroit, Mich. 48231.  
Combustion Engineering, Inc., 277 Park Avenue, New York, N. Y. 10017.  
Honorable Arthur H. Dean, 48 Wall Street, New York, N. Y. 10005.  
Eli Whitney Debevoise, 320 Park Avenue, New York, N. Y. 10022.  
First Boston Foundation Trust, 20 Exchange Place, New York, N. Y. 10005.  
Alwyn V. Freeman, 917 North Rexford Drive, Beverly Hills, Calif. 90210.  
The General Tire & Rubber Co., Akron, Ohio 44309.  
The Gillette Company, Boston, Massachusetts 02106.  
Gulf Oil Corporation, Gulf Building, Pittsburgh, Pa. 15230.  
IBM World Trade Corporation, 821 United Nations Plaza, New York, N. Y. 10017.  
John E. Leslie, 36 Wall Street, New York, N. Y. 10005.  
Morgan Stanley & Co., 140 Broadway, New York, N. Y. 10005.  
The Nestle-LeMur Company, 902 Broadway, New York, N. Y. 10010.  
Pan American World Airways, Pan Am Building, New York, N. Y. 10017.  
E. R. Squibb & Sons, 909 3rd Avenue, New York, N. Y. 10022.  
Swift & Company, 115 West Jackson Boulevard, Chicago, Ill. 60604.